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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RICHARD S. COHEN, ATTORNEY GENERAL,
STATE OF MAINE,

Petitioner,

v.

EQUIFAX SERVICES, INC.,
FRANK W. ROBINSON AND PAUL D. WEEKS,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

RICHARD S. COHEN
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QUESTIONS PRESENTED

1) Does 10 M.R.S.A. § 1314(1), which prohibits the preparation of an investigative consumer report without the written authorization of the consumer who is the subject of the report, violate the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment?

2) Does 10 M.R.S.A. § 1321, which restricts the reporting of certain categories of personal information by consumer reporting agencies, such as information relating to a consumer's race, religion, ethnic origin, and political affiliation, violate the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment?

PARTIES

The names of all parties to this proceeding are contained in the caption.

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EQUIFAX SERVICES, INC.,
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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

The Petitioner, the Attorney General of the State of Maine, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the State of Maine entered in this proceeding on September 9, 1980.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is reported at 420 A. 2d 189 (Me. 1980), and is attached to this petition as Appendix A. The unreported opinion of the Maine Superior Court for Kennebec County is attached as Appendix B.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on September 9, 1980, and this petition has been filed within the required time. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Maine Revised Statutes Annotated, Title 10:

§ 1314. Preparation and procurement of investigative consumer reports

1. Notice to consumer required. A person may not procure or cause to be prepared an investigative consumer report on any consumer unless:

A. That person has provided the consumer with clear and conspicuous written notice of the requested procurement or preparation and the consumer has, in turn, given a signed written authorization for each procurement or preparation; or

B. The report is to be used in connection with an investigation of an employee by that employee's present employer involving an employment purpose for which the employee has not specifically applied.

§ 1321. Prohibited information, accuracy, relevancy and obsolescence of information in reports

1. Reporting agencies. No consumer reporting agency shall prepare, use or report information:

A. Relative to a consumer's race, religion, color, ancestry, ethnic origin, sexual preference or orientation, political affiliation or political beliefs, except to the

extent required by governmentally imposed record-keeping requirements or to the extent necessary to prepare, use or report information relative to an arrest or criminal charge, as provided in paragraph B, or a consumer's marital status; or

B. Relative to an arrest or a criminal charge or admission of wrong doing in connection with a detention pursuant to Title 17, section 3521, unless there has been a criminal conviction for that offense or unless the charge is still pending, and, additionally, when the information reflects sexual preference or orientation, unless the conduct which is the basis of the arrest or criminal charge constitutes an offense under the provisions of the Maine Criminal Code or comparable law of another jurisdiction.

2. Irrelevant or inaccurate information. A consumer reporting agency shall not prepare, use or report information which it has reason to believe is inaccurate or not relevant to the purpose for which it is sought.

3. Procedures to insure report accuracy. A consumer reporting agency shall adopt and follow reasonable procedures designed to assure maximum possible accuracy of the information concerning the individual to whom the report relates and exclude from its file inaccurate information, information which cannot be verified, and information which it has no reason to believe is not relevant to the purpose for which it is sought.[1]

4. Items prohibited in reports.

A. Except as authorized under paragraph B, no consumer reporting agency may make any consumer report or investigative consumer report containing any of the following items of information:

(1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than 14 years;

[1]It appears that the placement of the word "no" in this subsection represents a legislative drafting error. The intent of the Legislature was that a consumer reporting agency exclude from its files information which it has reason to believe is not relevant to the purpose for which it is sought.

(2) Suits and judgments which, from date of entry, antedate the report by more than 7 years or until the governing statute of limitations has expired, whichever is the longer period;

(3) Paid tax liens which, from the date of payment, antedate the report by more than 7 years;

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than 7 years;

(5) Records of arrest or of conviction of crime which, from date of disposition, release or parole, antedate the report by more than 7 years;

(6) Information regarding drug or alcoholic addiction unless such information is provided by a licensed practicing physician and the information relating to such addictions does not antedate the consumer report or investigative consumer report by more than 7 years;

(7) Information relating to past confinement in a mental institution when the date of last confinement antedates the report by more than 7 years; and

(8) Any other adverse item of information which antedates the report by more than 7 years.

B. The provisions of paragraph A are not applicable in the case of any consumer credit report to be used in connection with:

(1) A credit transaction involving, or which may reasonably be expected to involve, a principal amount of $50,000 or more;

(2) The underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $50,000 or more except that the provisions of paragraph A, subparagraphs 6 and 7 are not applicable in connection with the underwriting of life insurance involving, or which may

reasonably be expected to involve, a face amount of $25,000 or more;

(2-A) The underwriting of disability income insurance involving, or which reasonably may be expected to involve, an indemnity for total disability of $1,000 per month or more; or

(3) The employment of any individual at an annual salary which equals, or which may reasonably be expected to equal, $20,000 or more.

STATEMENT OF THE CASE

In July 1977, the Legislature of the State of Maine enacted P.L. 1977, c. 514, known as the Maine Fair Credit Reporting Act (hereinafter the "Maine Act") and codified at Title 10 of the Maine Revised Statutes Annotated (M.R.S.A.) § 1311 *et seq.* The purpose of the Maine Act was set forth in the statement of legislative intent which accompanied the original bill:

> "This bill is introduced in order to limit intrusive abridgment of the right to privacy, while correspondingly preserving the interest in free inquiry and proper dissemination of appropriate information. It is intended to strengthen serious deficiencies in the Federal Fair Credit Reporting Act." Statement of Fact to Legislative Document No. 1526, Maine Legislature (1977).

Briefly stated, consumer reporting is a process in which a business entity (known as a "consumer reporting agency") obtains and disseminates information, pursuant to a contractual relationship, to another business entity (usually a prospective insurer, credit grantor, or employer) concerning an individual (known as a "consumer"). The recipient of the information (the "user") utilizes this information as one means of evaluating the consumer's eligibility for insurance, credit, employment, or some other "economic benefit". A "consumer report" means any communication by a consumer reporting agency, bearing on such matters as a consumer's credit worthiness and employment status, which is expected to be used as a factor in establishing the consumer's eligibility for an economic relationship

between the user and the consumer. 10 M.R.S.A. § 1312(3). An "investigative consumer report" is a consumer report which includes information "bearing on a consumer's character, general reputation, personal characteristics or mode of living" which is obtained from neighbors, friends or associates of the consumer. 10 M.R.S.A. § 1312(7).[2]

As indicated in the statement of legislative intent quoted above, the Maine Act supplements the provisions of the Federal Fair Credit Reporting Act (hereinafter the "Federal Act"), codified at 15 U.S.C. § 1681 *et seq.* The Maine Act and the Federal Act contain similar provisions designed to enhance the accuracy and reliability of consumer reports. Both the Maine Act and the Federal Act limit the reporting of certain items of "dated information", events deemed to have occurred too far in the past to be relevant to the purpose of determining the consumer's current credit worthiness. *See* 10 M.R.S.A. § 1321(4), 15 U.S.C. § 1681c. However, the Maine Act contains additional regulatory controls which provide significantly greater protection to the privacy interests of consumers than is afforded by the Federal Act. Among these added provisions are those declared unconstitutional by the Maine Supreme Judicial Court: 10 M.R.S.A. § 1314(1) and 10 M.R.S.A. § 1321.

Section 1314(1) of the Maine Act provides that, with an exception stated in § 1314(1) (B), no **investigative** consumer report can be prepared until the consumer who is the subject of the proposed report executes a signed written authorization for the preparation of the report. Section 1321(1) states that "no consumer reporting agency shall prepare, use, or report" certain categories of information relating to the consumer's personal life. The prohibitions in § 1321(1) (A) include information concerning a consumer's race, religion, ethnic origin, sexual preference, and political affiliation. Furthermore, § 1321(1) (B) prohibits the reporting of arrest information, in most cases, unless there

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[2]The entire Maine Act is attached to this petition as Appendix C, so that the Court has immediate access to the precise statutory language. Although the Maine Act has been amended in several respects since its original enactment, the overall regulatory scheme has not changed significantly. Moreover, the questions raised by Petitioner are intended to relate solely to the current version of the Maine Act.

has been a criminal conviction subsequent to the arrest or unless the charge is still pending. Section 1321(3) requires that consumer reporting agencies exclude from their files information which is inaccurate or irrelevant to the purpose of the report. Section 1321(4), as noted above, limits the reporting of specified items of dated information to situations enumerated in § 1321(4)(B). These content limitations reflected a legislative judgment that the harm caused to the privacy interests of consumers by the dissemination of certain categories of personal information through the medium of consumer reporting outweighs the interests of business in obtaining an unlimited amount of personal information.

In October 1977, suit was brought against the Attorney General of the State of Maine by Equifax Services, Inc., Frank W. Robinson, and Paul D. Weeks (hereinafter "Respondents"). Respondent Equifax Services is a consumer reporting agency which does a substantial volume of business in Maine. Respondents Weeks and Robinson are employees of Equifax Services. Respondents' Complaint challenged the constitutionality of the Maine Act on a variety of grounds, invoking the First Amendment, the Due Process Clause, the Equal Protection Clause, the Supremacy Clause, and the Commerce Clause. Following trial, the Maine Superior Court for Kennebec County issued a decision dated March 30, 1979, which held, *inter alia*, that § 1314 and § 1321 of the Maine Act were violative of the First Amendment to the United States Constitution. App. at B 12.[3]

The Attorney General (hereinafter "Petitioner") appealed the decision of the Superior Court to the Maine Supreme Judicial Court. In a decision dated September 9, 1980, the Supreme Judicial Court essentially affirmed (with some modifications) the judgment of the Superior Court as to § 1314 and § 1321. The Supreme Judicial Court held, *inter alia*, that § 1314(1), § 1321(1), § 1321(4)(A), and those portions of § 1321(2) and § 1321(3) limiting the use of "irrelevant" information violate the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment.

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[3]For the sake of clarity and brevity, this Statement of the Case does not discuss the resolution of those constitutional issues not currently before this Court.

In summary, the Supreme Judicial Court ruled that: the activities of Respondents involve "commercial speech" (App. at A 11); both § 1314 and § 1321 are direct restrictions on the content of commercial speech (App. at A 12); the provisions of § 1314 either do not further a substantial governmental interest, or these provisions are inadequately tailored to the governmental interest (App. at A 21); and the provisions of § 1321 which proceed beyond regulation of the accuracy of consumer reports cannot be valid. (App. at A 35). The holding of the Supreme Judicial Court was based upon the standard of review for commercial speech articulated by this Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, ___ U.S. ___, 100 S. Ct. 2343, 2350-2351, 65 L. Ed. 2d 341, 349-350 (1980). Apparently, the Supreme Judicial Court rejected Petitioner's argument that consumer reporting is a type of "commercial speech" entitled to a lesser degree of First Amendment protection than commercial advertising.

REASONS FOR GRANTING THE WRIT

I. The Maine Supreme Judicial Court Erroneously Equated Consumer Reporting With Advertising in Terms of First Amendment Protection

This case presents this Court with an opportunity to clarify the scope of the commercial speech doctrine. The analysis of the Supreme Judicial Court was predicated on the assumption that consumer reporting is entitled to the same degree of First Amendment protection as commercial advertising. Petitioner believes that neither the precedents from this Court nor the practical distinctions between consumer reporting and advertising support this critical assumption. Moreover, the reasoning of the Supreme Judicial Court, if followed generally, would erect serious obstacles to the regulation of "commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 458 (1978). *See also Friedman v. Rogers*, 440 U.S. 1, 10-11, n. 9 (1979).

A satisfactory definition of "commercial speech" has been somewhat elusive. *See Central Hudson Gas & Electric Corporation v. Public Service Commission, supra*, ___ U.S. at ___, 100 S.

Ct. at 2358, 65 L. Ed. 2d at 360 (Stevens, J., concurring). However, it seems clear that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson Gas & Electric Corporation v. Public Service Commission, supra,* ___ U.S. at ___, 100 S. Ct. at 2350, 65 L. Ed. 2d at 349. In the normal realm of commercial advertising, the speaker provides information to the consumer in an attempt to persuade the consumer to engage in an economic transaction beneficial to the speaker. The consumer is free to accept or reject the information. Significantly, the consumer has no personal stake in the **content** of the information, which usually involves discussion of products or services. Unless the advertising is false or deceptive, its content rarely proves detrimental to the consumer. In fact, advertising frequently conveys "information of potential interest and value to a diverse audience . . . ." *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

The situation regarding consumer reporting is quite different. The consumer reporting agency is not "speaking" to the consumer in any respect. Rather, the consumer reporting agency investigates and prepares information for the use of a third party which is considering an economic transaction with the consumer. This information may range from readily obtainable credit history information to subjective material concerning the consumer's personal life. Appendix D to this petition, a form used by Respondent Equifax Services (and introduced into evidence by Petitioner at trial), illustrates the kinds of information sought by consumer reporting agencies. Upon completion of the investigation, the consumer reporting agency transmits its report to the user, which utilizes the information to evaluate its potential economic relationship with the consumer. Therefore, in this three party arrangement the consumer is neither the speaker nor the listener; he is merely the subject of a consumer report, a communication from the consumer reporting agency to the user.

Presumably, the consumer understands that when he applies for insurance, credit, or employment, information concerning his economic reliability may be collected and evaluated. However, the consumer may not understand that, absent regulatory legislation, an investigative consumer report may contain such

matter as the opinion of a neighbor concerning the consumer's political beliefs and sex life. In light of the fact that such personal information generally does not bear a reasonable relationship to a consumer's insurability or credit worthiness, the Maine Act supports the reasonable expectation that certain kinds of information will be kept private. Therefore, the Maine Act represents an attempt to balance the needs of economic decisionmakers against the interests of the individual in controlling the dissemination of information concerning his personal life.

The relationship of consumer reporting to the "marketplace of ideas" protected by the First Amendment, *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 390 (1969), is, at best, indirect. The contents of consumer reports are not intended to provoke public debate. (*See* the confidentiality provisions in Appendix D). While the business activity of Respondents involves the use of information, it is considerably different in purpose and effect from the function of the press or the role of advertising. *See Hood v. Dun & Bradstreet, Inc.,* 486 F. 2d 25, 30 (5th Cir. 1973), *cert. denied,* 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.,* 438 F. 2d 433, 437 (3d Cir. 1971), *cert. denied,* 404 U.S. 898 (1972). Unlike individuals whose activities are reported in the mass media, the subjects of consumer reports do not have direct access to the information disseminated concerning them. In contrast to the recipients of advertising, who may avoid intrusion by declining to read or hear the message, the subject of an investigative consumer report cannot control the extent of the intrusion into his private life. This Court has recognized that intrusive commercial activity may be regulated in the public interest even though the activity includes an expressive element. *See Ohralik v. Ohio State Bar Association, supra,* 436 U.S. at 465, n. 25.

Petitioner submits that the intrusive nature of consumer reporting renders it subject to types of regulation which might not be valid if applied to advertising, and that the Supreme Judicial Court erred in equating consumer reporting with advertising in terms of First Amendment protection.

II. The Decision of the Maine Supreme Judicial Court Reflects an Erroneous View of the State's Interest in Protecting Personal Privacy

In judging the constitutionality of the Maine Act, the Supreme Judicial Court applied the four part test for commercial speech set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, supra,* ___ U.S. at ___, 100 S. Ct at 2350-2351, 65 L. Ed. 2d at 349-350. After finding that consumer reporting could not be deemed false or misleading *per se*, the Court assessed the State's asserted substantial interest in protecting personal privacy. The Court concluded that the interest in protecting privacy could be considered a "substantial governmental interest" only in those limited circumstances in which a "right to privacy", derived from the Constitution or tort law, has previously been held to exist. In the Court's words:

> "It would appear, then, that the above delineated particular 'zones' or 'areas', as intruded upon by the particular conduct described, represent the extent of a governmental interest in protecting 'privacy' that may fairly be taken as being **substantial**." App. at A 20.

The Court proceeded to hold that the provisions of § 1314(1) and § 1321 either are not supported by a substantial governmental interest, or fail to directly advance that interest in a manner least restrictive of expression.

It is apparent that the Supreme Judicial Court misunderstood the meaning of the term "substantial governmental interest" within the framework of the *Central Hudson* test. A governmental interest need not assume constitutional dimension in order to be substantial. On many occasions, when privacy interests have been asserted in support of regulations limiting expressive activity, this Court has found such interests to be substantial without reference to the Constitution or tort law. *See*, for example, *Carey v. Brown,* ___ U.S. ___, 100 S. Ct. 2286, 2296, 65 L. Ed. 2d 263, 276 (1980); *Ohralik v. Ohio State Bar Association, supra,* 436 U.S. at 465; *Breard v. Alexandria,* 341 U.S. 622, 644-645 (1951). This Court has stated that:

> "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown, supra,* ___ U.S. at ___, 100 S. Ct. at 2296, 65 L. Ed. 2d at 276.

Certainly, the protection of an individual's reasonable expectations of informational privacy ranks equally with the protection of residential privacy as an important governmental interest. This Court has noted that, while the Constitution protects individuals from certain kinds of **governmental** intrusion:

> "the protection of a person's **general** right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States." [footnotes omitted] *Katz v. United States*, 389 U.S. 347, 350-351 (1967).

The unduly restrictive view of the State's interest in protecting privacy represented the most serious flaw in the reasoning of the Supreme Judicial Court. This error tainted the Court's subsequent analysis of the third and fourth components of the *Central Hudson* test.

As described *supra,* consumer reporting implicates privacy concerns not present in the area of advertising, and the Maine Act attempts to protect the consumer from unnecessarily intrusive probing into his private life. Consumer reporting is intrusive in two aspects which are related but are discrete. First, the act of preparing an investigative consumer report includes, by definition, personal interviews with friends, neighbors, and associates of the consumer. These interviews intrude directly upon the persons being interviewed, and indirectly upon the subject of the report. Secondly, the kinds of questions asked during an investigation may elicit information not reasonably relevant to the economic purpose underlying the report. The dissemination of such inappropriate information invades the privacy of the consumer and may result in reputational injury.

Section 1314(1) of the Maine Act addresses the first intrusive aspect of consumer reporting by requiring that the consumer consent before the investigative process can commence. In other words, the consumer is allowed to decide whether a consumer

reporting agency may commence a detailed investigation into his personal affairs. Of course, the prospective user of the report retains the right to refuse the economic benefit sought by the consumer if he declines to authorize the investigative report. But § 1314(1) serves two important functions. Initially, it makes the consumer aware of the privacy cost involved in his application for insurance, credit, or employment. Further, § 1314(1) provides the consumer with some control over the dissemination of information in which he has a personal stake. "Privacy is not simply the absence of information about us in the minds of others; rather it is the **control** we have over information about ourselves." Fried, *Privacy,* 77 Yale L. J. 475, 482 (1968).

It should be noted that § 1314(1) and § 1321 do not directly infringe upon the activities of insurance companies, banks, etc. These economic decisionmakers remain free to collect and use any information they deem appropriate. Viewed in this light, the authorization requirement represents a regulation of the manner of obtaining information, a limitation on the **conduct** of investigative consumer reporting rather than a restriction on expression *per se. See American Future Systems, Inc. v. Pennsylvania State University,* 618 F. 2d 252 (3d Cir. 1980), which stands for the proposition that commercial activity may be regulated notwithstanding an incidental effect upon commercial speech.

The second aspect of the intrusiveness of consumer reporting relates directly to the nature of the information disseminated. Section 1321 of the Maine Act reflects a legislative judgment that certain categories of information, such as race, religion, and ethnic origin, are not appropriately contained in reports intended to aid in the assessment of a consumer's eligibility for insurance, employment, or credit. The only effective way of enforcing this legislative judgment is to limit the reporting of inappropriate information. The mere dissemination of inappropriate information harms the privacy interests of the consumer, even if the user of the report does not base its decision on such information. Therefore, unlike advertising, information contained in consumer reports can be harmful even if it is not false or misleading. Since "the individual's right to the protection of his good name is a basic concept of human dignity which is at the root of any system of ordered liberty", *Roemer v. Retail*

Credit Company, 44 Cal. App. 3d 926, 932, 119 Cal. Rptr. 82, 85 (1975), the State has a substantial interest in limiting the content of consumer reports to information which is relevant to the purpose of the reports. Furthermore, this interest cannot be advanced in a manner less restrictive than the means chosen by the Maine Legislature. It has been recognized that restrictions related to the content of expression are more likely to withstand scrutiny in a commercial speech framework than if fully protected speech were involved. *See Central Hudson Gas & Electric Corporation v. Public Service Commission, supra,* ___ U.S. at ___, 100 S. Ct. at 2354, 65 L. Ed. 2d at 354; *Virginia Board of Pharmacy v. Virginia Citizens Council,* 425 U.S. 748, 771-772, n. 24 (1976). *See also Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726, 744 (1978); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 68-69 (1976).

In sum, both § 1314 and § 1321 represent regulatory means which are well tailored to address the unique privacy problems raised by consumer reporting. In contrast to many of the recent precedents involving commercial advertising, the Maine Act does not impose a sweeping prohibition on a medium of expression. The consumer authorization requirement of § 1314(1) and the content limitations of § 1321 are designed to regulate the consumer reporting industry, "an area traditionally subject to government regulation", *Ohralik v. Ohio State Bar Association, supra,* 436 U.S. at 456, in a manner which serves both the informational needs of commerce and the privacy needs of consumers. Careful analysis will lead this Court to the conclusion that neither section violates the First Amendment to the United States Constitution.

III. The Ability of the State and Federal Governments to Regulate Consumer Reporting in a Manner Consistent with the Evolving Commercial Speech Doctrine Represents an Important Question of Federal Law

In declaring § 1314(1) and much of § 1321 of the Maine Act unconstitutional, the Maine Supreme Judicial Court has extended this Court's recent holdings concerning advertising to the regulation of consumer reporting, an area to which the precedents are not controlling. As Petitioner has argued *supra,*

are compelling reasons to distinguish consumer reporting from advertising. Moreover, the decision casts doubt upon the validity of a substantial number of State statutes.

Aside from Maine, at least thirteen States have laws which regulate consumer reporting in some manner.[4] Ten of these States have placed limits on the content of consumer reports; most of these limits relate to dated information and criminal history information. Presumably, all of these limitations would be invalid under the rationale adopted by the Supreme Judicial Court. The New York Fair Credit Reporting Act contains a provision, almost identical to § 1314(1) of the Maine Act, which prohibits the preparation of an investigative consumer report without the consent of the consumer who is the subject of the report. N. Y. Gen. Bus. Law § 380-c(a) (McKinney 1979 Supp.). Moreover, as the Supreme Judicial Court noted in its decision, the Federal Act limits the use of dated information in consumer reports. 15 U.S.C. § 1681c. If allowed to stand, the reasoning of the decision below would render unconstitutional this portion of the Federal Act.

Therefore, the Maine Act does not stand in isolation; it is one of many statutory schemes which regulate the consumer reporting industry. While Petitioner acknowledges that the expressive component of consumer reporting is not entirely outside the scope of First Amendment protections, there is no authority for the proposition that all types of commercial speech must be accorded the same protection as advertising. The most recent authoritative statement on the subject of consumer reporting appeared in *Millstone v. O'Hanlon Reports, Inc.*, 528 F. 2d 829 (8th Cir. 1976), which was decided shortly after the commencement of the shift in commercial speech doctrine. More precisely,

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[4]Arizona - Ariz. Rev. Stat. § 44-1691 *et seq.*; California - Cal. Civ. Code § 1785.1 *et seq.*; Kansas - Kan. Stat. Ann. § 50-70 *et seq.*; Maryland - Md. Comm. Law Code Ann. § 14-1201 *et seq.*; Kentucky - Ky. Rev. Stat. § 367.310; Massachusetts - Mass. Gen. Laws Ann. c. 93, § 50 *et seq.*; Montana - Mont. Rev. Codes Ann. § 18-501 *et seq.*; New Hampshire - N.H. Rev. Stat. Ann. § 359-B:1 *et seq.*; New Mexico - N.M. Stat. Ann. § 56-3-1 *et seq.*; Nevada - Nev. Rev. Stat. § 598B.130; Connecticut - Conn. Gen. Stat. Ann. § 36-431 *et seq.*; Oklahoma - Okla. Stat. Ann. tit. 24, § 81 *et seq.*; New York - N.Y. Gen. Bus. Law (McKinney), § 380 *et seq.*

Millstone was decided after the decision in *Bigelow v. Virginia, supra,* but before *Virginia Board of Pharmacy v. Virginia Citizens Council, supra.* In *Millstone* the Eighth Circuit upheld the constitutionality of the Federal Act. The court noted that "the challenged statute supports and protects a significant personal right, the right to privacy", 528 F. 2d at 823, and concluded that:

> "it is our view that . . . consumer credit reports are not protected speech for which under the First Amendment 'Congress shall make no law . . .' " 528 F. 2d at 833

If the reasoning developed in *Millstone* has not been undermined by *Virginia Pharmacy* and its progeny, a conflict involving principles of constitutional law exists between the Maine Supreme Judicial Court and the Eighth Circuit. Even if the extent of the holding in *Millstone* has been rendered suspect by subsequent commercial speech decisions of this Court, there is still no good reason to equate consumer reporting with advertising in terms of First Amendment protection.

The courts have consistently held that credit reporting agencies (engaged in credit investigations of consumers and/or businesses) do not possess an immunity from libel actions which is grounded in the First Amendment.[5] *See Hood v. Dun & Bradstreet Inc., supra; Oberman v. Dun & Bradstreet, Inc.,* 460 F. 2d 1381 (7th Cir. 1972); *Kansas Electric Supply Company v. Dun & Bradstreet, Inc.,* 448 F. 2d 647 (10th Cir. 1971); *Grove v. Dun & Bradstreet, Inc., supra; Wortham v. Dun & Bradstreet, Inc.,* 399 F. Supp. 633 (S.D. Texas 1975), *aff'd.,* 537 F. 2d 1142 (5th Cir. 1976); *Roemer v. Retail Credit Company, supra; Retail Credit Company v. Russell,* 234 Ga. 765, 218 S. E. 2d 54 (1975). Moreover, no lower court has held that the commercial speech cases decided by this Court should be construed to provide a constitutionally based immunity for consumer reporting agencies. *See Thornton v. Equifax,* 619 F. 2d 700, 705 (8th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3266 (1980). These cases are instructive be-

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[5]In effect, the credit reporting agencies argued that the "actual malice" standard articulated in *New York Times v. Sullivan,* 376 U.S. 254 (1964), should apply to libel actions arising from their activities.

cause, in the course of analyzing the First Amendment interests at stake, the courts have emphasized the differences in operation between consumer reporting agencies and institutions, such as the press, traditionally protected under the First Amendment.

As this Court has noted on several occasions, there are substantial distinctions between the regulation of expression related to commercial activity and the regulation of "fully protected" speech. The decision of the Supreme Judicial Court misconstrues the precedents of this Court and erodes these critical distinctions. Furthermore, the reasoning of the decision appears to imperil other well-established types of economic regulation, including securities laws, labor laws, antitrust laws, and debt collection laws, all of which limit commercial expression to some extent. *See Ohralik v. Ohio State Bar Association, supra,* 436 U.S. at 455-456.

Clearly, the decision of the Supreme Judicial Court places unprecedented limitations on the power of government to regulate consumer reporting in the public interest. This Court should review that decision to correct an erroneous interpretation of the First Amendment.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court.

DATED: December 1, 1980

Respectfully submitted,

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APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 2405
Law Docket No. Ken-79-13

EQUIFAX SERVICES, INC.,
FRANK W. ROBINSON and PAUL D. WEEKS

v.

RICHARD S. COHEN, ATTORNEY GENERAL

Argued — September 20, 1979
Decided — September 9, 1980

Before McKUSICK, C.J., POMEROY,* WERNICK, ARCHIBALD,** GODFREY and NICHOLS, JJ.

WERNICK, J.

The defendant Richard S. Cohen, in his capacity as the present Attorney General of the State of Maine (substituted as party defendant in this action in place of his predecessor in office Joseph E. Brennan who was originally named as defendant), has appealed from a judgment of the Superior Court (Kennebec County) which: (1) adjudicated invalid particular provisions of the Maine Fair Credit Reporting Act (hereinafter the Maine Act), on the grounds that all of said provisions were unwarranted restraints upon constitutionally protected commercial speech and that some of them, because of their vagueness, also contravened constitutional due process of law; and (2) permanently enjoined the defendant Attorney General from enforcing the statutory provisions thus invalidated.

By a cross appeal plaintiffs Equifax Services, Inc. (Equifax), Frank Robinson and Paul Weeks contend that the judgment wrongly decided some, and erroneously failed to decide some others, of the additional attacks they made against various provisions of the Maine Act.

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* Pomeroy, J., sat at oral argument but retired prior to preparation of the opinion.

** Archibald, J., sat at oral argument but retired prior to preparation of the opinion. He joins the opinion as Active Retired Justice.

We deny the appeal and the cross appeal.

As we interpret the scope of the Superior Court judgment, we affirm its injunction against the enforcement of Sections 1314 and 1321 of the Act, in their original and amended versions, as adjudicating unconstitutional restraints upon commercial speech. We affirm, too, the adjudication rejecting plaintiffs' constitutional attack, asserted in Count 5 of their amended complaint, based on the "supremacy" clause of Article VI of the Constitution of the United States.

We modify the Superior Court's judgment, however, in two respects.

First, we add a clause to include an adjudication that Section 1323(2) is an unconstitutional abridgement of commercial speech insofar as it authorizes an award of additional damages for each "irrelevant" item included in a consumer report.

Second, we strike from the judgment, as determinations of constitutional issues that were made unnecessarily in that they related to the same provisions of the Maine Act the presiding Justice had otherwise invalidated, correctly we decide, as unconstitutional abridgements of commercial speech: (1) that part holding various provisions "void for vagueness" and (2) that part deciding in favor of defendant on Counts 3, 4 and 6 of plaintiffs' amended complaint which, together, alleged violations of the "commerce" clause, as well as the "due process of law" (in substantive, as distinguished from procedural, terms) and the "equal protection of the laws" clauses of the Fourteenth Amendment to the Constitution of the United States.

I. FACTUAL AND PROCEDURAL BACKGROUND.

I-A. Nature of the Business Involved.

The plaintiff Equifax is a Georgia Corporation authorized to do business in Maine. The plaintiff Frank Robinson was Vice-President of a region of Equifax which included Maine, and the plaintiff Paul Weeks was the manager of an Equifax office maintained in Falmouth, Maine. Equifax engages in the business of being a "consumer reporting agency", as defined in Sec-

tion 1312(4) of the Maine Act[1] and in the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681a(f)[2] (the Federal Act). Equifax has offices all over the United States, several of which are located in Maine.

As a consumer reporting agency, Equifax gathers and sells information about individuals who have applied for credit, insurance or employment (or the like). Among the purchasers of these informational reports ("consumer reports") are insurance companies, banks and diverse kinds of employers. We refer to the purchasers of consumer reports as "users." The users need information from various sources to enable them properly to evaluate a consumer's qualifications and capacity to undertake the particular transactions involved in applications of consumers for credit, insurance coverage, employment and so forth. Approximately 80 to 85 percent of the Maine users to which Equifax has furnished consumer reports have been engaged in the business of insurance. In 1976, Equifax furnished more than 60,000 consumer reports to users in the State of Maine, and in 1977 and 1978 the volume of such reports was approximately the same.

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[1] 10 M.R.S.A. § 1312(4) (Supp. 1979-80):

> " 'Consumer reporting agency' means any person who, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports or investigative consumer reports to 3rd parties.
>
> "For purposes of this chapter, the phrase '3rd party' shall not include an insurer to the extent consumer credit information or other information on consumers is furnished to the insurer by its own employee or licensed agent."

[2] 15 U.S.C. § 1681a(f) (1974):

> "(f) The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

The reports themselves vary in nature and scope, depending on the purposes for which they may be drawn. Thus, for example, the reports to life insurance companies will be in a form and have a content to assist in the underwriting of life, health and disability insurance; as furnished to fire and casualty insurers, the reports will be geared to help the underwriting of fire and casualty policies on home or automobile; as provided to employers, the reports will be formulated to be of benefit in the making of hiring decisions as to various kinds of work; and as sent to banks, reports will be formulated to be of benefit in the evaluation of applicants for loans. Equifax uses numerous printed forms containing a series of questions about consumers, the questions being devised to relate to particular transactions involved. The scope of the information may include data on a consumer's past or present employment, home environment, hobbies, health, use of alcohol or drugs, criminal record, credit record, military record, sources of income, financial stability, reputation, and so forth. In consequence of consultations between Equifax and users, the information supplied in the reports conforms very generally to areas designated by users, and various questionnaire forms are prepared and utilized to obtain the kinds of information users wish to have furnished. The process of gathering information also varies according to the purpose and nature of the consumer report. Typically, field investigators employed by Equifax compile information through personal interviews with the consumers who are the subjects of reports, through interviews with their friends, neighbors and associates and also through investigations of public records.

Although the uses to which consumer reports may be put vary according to the needs of particular users, the record before us suggests that at least in the insurance context, which encompasses the large majority of the reports furnished in Maine, the reports are used mainly to achieve a final verification of information received from other sources — such as, for example, the information acquired from insurance application forms and from the observations, or reports, or both, of insurance agents. The consumer reports serve to verify and supplement data received through these other sources. Should an inconsistency appear concerning an important aspect of an ap-

plication, a further investigation may be ordered either by the user or the consumer reporting agency in an effort to clarify the inconsistency. Thus, consumer reports generally serve as one, albeit an important, source of information through which users seek to obtain information to assist them in making decisions incident to the conduct of their businesses.

I-B. The Federal Regulatory Scheme.

It will assist us fully to understand the Maine regulatory scheme if we first examine various provisions of the Federal Act, which also regulates large parts of the consumer reporting industry as conducted in Maine.

In October 1970, the Congress of the United States enacted the Federal Act, 15 U.S.C. §§ 1681-1681t (1974). While expressly recognizing the primacy of the value of maintaining a free flow of fair, accurate information, as well as that

> "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers," 15 U.S.C. § 1681(a) (3) (1974),

Congress sought to protect consumers from arbitrary, secretive reporting procedures, and inaccurate and intrusive reporting. *See* 15 U.S.C. § 1681(a) (1), (4) (1974). The regulatory scheme established by Congress includes the following provisions. It limits the purposes for which a "consumer report"[3] may be furnished, requiring that the reporting agency must reasonably be-

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[3]15 U.S.C. 1681a(d) (1974) defines "consumer report":

> "The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific

lieve that the user of the report has a "legitimate" business need for the information, as clarified by certain enumerated uses. *See* 15 U.S.C. § 1681b (3). For any other purpose, a reporting agency must obtain either prior consent of the subject-consumer or a court order. 15 U.S.C. § 1681b(1), (2). The Federal Act flatly prohibits the making of a consumer report containing certain dated public record information, such as a bankruptcy record over fourteen years old, or tax liens, arrest records, and any "other adverse item of information" over seven years old. 15 U.S.C. § 1681c(6). Section 1681d requires that when a user requests an "investigative consumer report,"[4] — a consumer report containing information relating to, among others, a consumer's character, general reputation or mode of living, see 15 U.S.C. § 1681a(e), — unless the report is to be used for the purpose specified in Section 1681d(a) (2), a consumer **must** be given clear, written notice that (1) such a report was requested and (2) the consumer is entitled to disclosure from the user of the "nature and scope" of the investigation. Furthermore, reporting agencies are required to establish procedures designed to keep information current, accurate, and confidential, and to

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extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title."

[4] 15 U.S.C. § 1681a(e) (1974) defines "investigative consumer report":

> "The term 'investigative consumer report' means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer."

disclose upon request of the consumer the substance of the information on file, (15 U.S.C. §§ 1681e, 1681g, 1681h), and to establish an investigation procedure to be followed when a consumer disputes the accuracy of any information (15 U.S.C. § 1681i). Certain users are required to notify a consumer who is denied employment, or insurance for personal, family, or household purposes, or who is denied credit or is charged more for such credit, where any such adverse decision results wholly, or partly, from information contained in a consumer report. Such notice includes the name and address of the consumer reporting firm. 15 U.S.C. § 1681m(a). Section 1681m(b) requires that users, upon request, disclose the substance of the information that resulted in adverse action. The Federal Act provides civil liability and criminal sanctions for noncompliance with its provisions. 15 U.S.C. §§ 1681n, 1681o, 1681q, 1681r. It expressly permits the states also to regulate provided that state regulation is not inconsistent with the Federal Act. 15 U.S.C. § 1681t.

I-C. The Maine Regulatory Scheme.

In July 1977 the Maine legislature enacted, effective October 24, 1977, the Maine Fair Credit Reporting Act (P.L. 1977, c. 514). Essentially, the Maine Act paralleled the Federal Act, except as to particular provisions pertinent to the instant proceeding that we discuss later. The Maine Act was amended in 1978, effective July 6, 1978 (P.L. 1977, c. 677).

In overview summary the Maine Act differs from the Federal Act as follows. It goes beyond the Federal Act in imposing stricter requirements upon reporting agencies regarding their preparation and dissemination of consumer reports. Whereas the Federal Act requires specific notice be given to a consumer before a user can procure an "investigative consumer report," the Maine Act prohibits a user from procuring such a report until prior written authorization of the consumer is obtained. 10 M.R.S.A. § 1314(1).[5] In addition, the Maine Act provides for

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[5] 10 M.R.S.A. § 1314(1) (Supp. 1979-80):

> **"Notice to consumer required.** A person may not procure or cause to be prepared an investigative consumer report on any consumer unless:
>
> > **"A.** That person has provided the consumer with clear and conspicuous written notice of the requested procurement or

many more absolute prohibitions against the reporting of information. Whole categories of information, such as race, religion, political affiliation and beliefs, and so forth, are classified as prohibited and to be excluded from reports. *See* 10 M.R.S.A. § 1321(1).[6] While adopting the prohibition contained in Section 1681c of the Federal Act against the inclusion of certain public record information, the Maine Act adds two more prohibited categories of public record information — relating to drug or alcohol addiction and confinement in a mental institution — and also adds entirely new sections which prohibit information concerned with race, religion, color, national ancestry (and the like). *See* 10 M.R.S.A. § 1321(1), (4). Furthermore, the Maine Act permits limited disclosures of medical information, 10 M.R.S.A. § 1315(1) (A) whereas the Federal Act excludes such information from disclosure. Maine requires that "investigative consumer reports be written", 10 M.R.S.A. § 1319(2), whereas the Federal Act allows them to be oral. The Maine Act fails to confer the qualified immunity given by the Federal Act relative to consumer suits against designated persons for defamation, invasion of privacy or negligence with respect to the reporting of information, *cf.* 15 U.S.C. § 1681h(e).

I-D. Procedural History.

On October 13, 1977, Equifax, and the other plaintiffs, instituted a civil action in the Superior Court (Kennebec County) against the then Attorney General of Maine, Joseph E. Brennan. Plaintiffs sought a declaratory judgment adjudicating that certain provisions of the Maine Act, about to take effect on October 24, 1977, were unconstitutional, and plaintiffs asked that the Attorney General be permanently enjoined from enforcing such provisions of the Act as would be adjudicated unconstitu-

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> preparation and the consumer has, in turn, given a signed written authorization for each procurement or preparation; or
>
> "**B.** The report is to be used in connection with an investigation of an employee by that employee's present employer involving an employment purpose for which the employee has not specifically applied."

[6]The text and substance of Section 1321 are set out at n. 12, **infra**.

tional. When the Maine Act became effective on October 24, 1977, a temporary restraining order was issued. It was subsequently dissolved when, on December 14, 1977, the Superior Court Justice refused to order issuance of a preliminary injunction.

As we have mentioned, amendments to the Maine Act became effective in July, 1978. Thereafter, plaintiffs filed an amended complaint which restated their attack upon the Maine Act as it read before being amended and added further challenges to the Act in light of the amendments to it. The defendant Attorney General moved to dismiss on grounds of mootness those paragraphs of the amended complaint challenging sections of the Act that had been repealed or modified. The Justice denied this motion, and defendant's appeal includes an attack on the correctness of that ruling.

A hearing on the merits was held in November 1978, at which plaintiffs presented several witnesses and introduced numerous exhibits. Defendant presented no witnesses but introduced exhibits including: (1) a deposition of the plaintiffs Weeks and Robinson; (2) numerous examples of the forms used by Equifax in collecting and reporting information; (3) excerpts from manuals used by employees of Equifax to guide them in the preparation of reports.[7]

On the basis of the record made before him, the Superior Court Justice held unconstitutional two sections of the Maine Act in both their originally enacted and subsequently amended versions: (1) Section 1314, as requiring a consumer's prior consent before an "investigative consumer report" on him may be procured, and (2) Section 1321, as outlawing the preparation and sale of reports containing delineated categories of prohibited information. The ground of decision was that these sections violated the First Amendment, as made binding on the States by the Fourteenth Amendment, to the Constitution of

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[7]At a hearing on the motion for a preliminary injunction on November 10, 1977, defendant introduced two affidavits of one individual who had allegedly been the victim of a fake credit report prepared by Equifax. The affidavits were introduced solely for the purposes of the preliminary injunction and apparently were not introduced at the hearing on the merits.

the United States. The Superior Court Justice also adjudicated that particular prohibitions contained in Section 1321 were so vague that they could not meet the "due process of law" guaranty of the Fourteenth Amendment.

In accordance with his determinations, the Justice permanently enjoined the defendant Attorney General from enforcing those provisions of the Maine Act adjudicated unconstitutional. The Justice either rejected, or made no decision regarding, other constitutional challenges asserted by plaintiff: challenges predicated on the due process of law, commerce clause, supremacy clause, and equal protection of the laws provisions of the federal Constitution.

From the judgment entered embodying the conclusions and actions of the Superior Court Justice, defendant has appealed to this Court. In addition, as we stated earlier, plaintiffs have taken a cross appeal in which they attack as erroneous the Superior Court's determination of, or omission to decide, the various other constitutional issues raised.

II. THE FIRST-FOURTEENTH AMENDMENT PROTECTION OF SPEECH ISSUES.

II-A. Further Details of the Decision of the Superior Court.

The Superior Court adjudicated originally enacted, and subsequently amended, Sections 1314 and 1321 of the Maine Act unconstitutional as an unwarranted abridgment of protections afforded commercial speech by the First-Fourteenth Amendments to the Constitution of the United States. By cross appeal the plaintiffs contend that the Court was wrong in failing to decide that Section 1313 also abridges constitutionally protected commercial speech.

In holding Section 1321 violative of the constitutional protection afforded commercial speech, the Superior Court Justice, without distinguishing among its various subsections, stated:

> "where Section 1321 prohibits the reporting of certain broad categories of information in any circumstances,

> even with the consent of the consumer involved, the free flow of accurate public record information has been unlawfully restricted."

The adjudication is thus unclear. Did the Justice conclude that all the parts of Section 1321 that purported to exclude whole categories of information are, as such, direct and unlawful restrictions of protected commercial speech even if the category of information excluded does not pertain to **public record** information; or did he decide, rather, that the entire Section 1321 scheme intrudes too extensively upon constitutionally protected speech by prohibiting the communication even of information contained in public records?

We interpret the Justice's decision as follows. It invalidated Section 1321(1), the portion of Section 1321(2) pertaining to irrelevant information, the portion of Section 1321(3) directed toward expungement of irrelevant information, and Section 1321(4) (A). The ground of invalidation was that those provisions impose unwarranted direct restrictions upon constitutionally protected commercial speech.

II-B. The Nature and Scope of Our Appellate Review.

Before we address the merits of the contentions of the respective parties as to constitutionally protected commercial speech, we must first clarify several factors bearing upon the nature, and scope, of our appellate scrutiny of the issues raised.

We emphasize, first, that our appellate analysis will be strictly confined within the particular framework fixed by all of the parties, as well as by the adjudication of the Superior Court. One bound of that framework is that the mode of speech regulated by the Maine Act is **commercial** speech. Our appellate review thus proceeds on the basis that **in this particular case** a ground rule has been estabished confining our analysis to the First-Fourteenth Amendment protection of **commercial** speech. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, ____ U.S. ____, 48 U.S.L.W. 4783, 4784, n. 5 (June 17, 1980). For this reason, our decision of this case neither states nor intimates any opinion whatever regarding whether all the parties and the Superior Court were correct in classifying as

commercial speech any, or all, of the modes of speech the Maine Act regulates.

Second, we regard Sections 1314 and 1321, the particular statutes held by the Superior Court to be violative of the First-Fourteenth Amendments, as direct restrictions upon speech based upon the **content** of that speech; we do not look upon them as mere time, place, or manner restrictions. *See Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York,* ___ U.S. ___, 48 U.S.L.W. 4776, 4777 (June 17, 1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Grayned v. City of Rockford,* 408 U.S. 104, 115-16, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The analysis will be somewhat extended to establish this point in relation to the restraint imposed by Section 1314(1), particularly as it affects the business of the plaintiff Equifax. Without need of extended discussion, however, we find it plain that Section 1321 puts a direct content-based restraint on speech. It prohibits outright the preparation, use, or reporting of specifically defined categories of information: in (1) (A) information "[r]elative to . . . race, religion, color, ancestry, ethnic origin," and so forth, and in (1) (B) information "[r]elative to an arrest or criminal charge"; in (2) information "not relevant to the purpose for which it is sought"; in (4) certain more particularly delineated information. All of these provisions of Section 1321 prohibit the reporting of the information **solely** because of the nature of its **content**.

In fuller elucidation of the nature of the restraint imposed by Section 1314(1), it might appear at first blush that its requirement that a **user** obtain prior written authorization from a consumer before procuring an investigative consumer report has only a remote relationship to the commercial speech of Equifax, which is a **supplier** of consumer reports. On the surface, the requirement seems to burden, or inconvenience, **users** rather than suppliers. Were this indeed the only practical effect of the statute, we would be reluctant to adjudicate the constitutional challenge being made here by a **supplier** — particularly in light of the United States Supreme Court's warnings that the full-blown "overbreadth" approach applied to other modes of speech may

not be applicable to commercial speech. As the Supreme Court stated most recently in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra,* in distinguishing the "overbreadth" doctrine from the requirement that restrictions on commercial speech be "narrowly drawn":

> "The . . . [overbreadth doctrine] permits the invalidation or regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity. . . . The overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review. . . . This restraint is less likely where the expression is linked to 'commercial well-being' and therefore is not easily deterred by 'overbroad regulation.' " *Id.,* n. 8.

See also Bates v. State Bar of Arizona, 433 U.S. 350, 379-82, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Virginia Pharmacy Board, supra,* 425 U.S. at 771, n. 24; *Friedman v. Rogers,* 440 U.S. 1. 10-11, n. 9, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 462, n. 20, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

However, because of what the instant record shows is the effect of Section 1314(1) on the business of Equifax, we think it sufficiently evident that the speech restraints it imposes are not remote as against Equifax. Equifax operations in Maine are part of a nationwide consumer reporting enterprise. The record discloses that a substantial volume of Equifax's business in Maine involves users not located in Maine. Plaintiff Paul Weeks, manager of the office maintained by Equifax in the Portland area, testified that

> "the bulk of our reports do go to customers out of the State of Maine. Most of our customers are domiciled in other states, our major life companies, major casualty companies, all types of customers."

He further testified that 25 to 30 percent of the reports made each year relate to non-residents of Maine. Whereas Maine users of consumer reports would be subject to the requirement

of prior consumer consent, out-of-state users may not be thus subject to such a requirement under their own state law. If an out-of-state user were not subject to such a restriction, and ordered either the preparation and transmission of a report or the communication of information already on file and ready to be reported by the consumer reporting agency, Equifax would be unable to respond unless and until it had first required the user to supply the requisite written consent. If Equifax did not do this, being a Maine consumer reporting service, it would be subject to potential criminal penalties under Section 1326 of the Maine Act. The restraint could therefore translate into costly delay, and even a loss of business; indeed, the record reflects that after the Maine Act became effective, Equifax incurred some loss of business that was related to the stringency of the Act's requirements.

As brought in play in this case, then, the prior consumer consent requirement of Section 1314(1) impairs the ability of Equifax to respond effectively and promptly to requests from out-of-state users of reports. So viewed, Section 1314(1) operates as at least a prior restraint[8] and at most a total restraint on commercial speech of Equifax that may qualify for protection under the First-Fourteenth Amendments. *Cf. Smith v. Daily Mail Pub-*

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[8]There has been some suggestion that the doctrine of prior restraint may be inapplicable to the commercial speech area. *Virginia Pharmacy Board* stated that the "greater objectivity and hardiness" of commercial expression may permit more exacting regulation, and **"may** also make inapplicable the prohibition against prior restraints." (emphasis added) *Id.* at 771, n. 24. *See also Friedman v. Rogers, supra,* 440 U.S. at 10-11, n. 9. However, we interpret this statement to signify that the Supreme Court of the United States is manifesting a degree of caution in the extent to which it carries over traditional First Amendment protections to "this uncharted area" of commercial speech. *See Id.* at 10-11, n. 9 ("[w]hen dealing with restrictions on commercial speech we frame our decision narrowly. . ."); *Beneficial Corp. v. Federal Trade Commission,* 542 F.2d 611, 620 (3rd Cir. 1976), *cert. den.* 430 U.S. 983 (1977). (The court "must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception.") We surmise, therefore, that the applicability of the doctrine of prior restraint to commercial speech will develop on a case by case basis, with due consideration being given to all the factors that bear upon the analysis of the **necessity** of a particular regulation as a **direct** advancement of **substantial** governmental interests.

lishing Co., 443 U.S. 97, 99 S.Ct. ____, 61 L.Ed.2d 399 (1979) (law criminalizing newspaper's publication, without prior written approval of juvenile court lawfully obtained, of truthful information concerning name of youth charged as a juvenile offender held an impermissible prior restraint.)

Thus, Sections 1314 and 1321 are not time, place, or manner restrictions. A "constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co., supra,* ____ U.S. ____, at ____. Neither Section 1314 nor Section 1321 operates totally apart from the content of the consumer report, and under these sections it cannot be said with reasonable certainty that "alternative channels for communication" are left open. *See Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 93, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Virginia Pharmacy Board, supra,* 425 U.S. at 771.

II-C. The Merits of the Speech Challenges Against Particular Provisions of the Maine Act.

Having expressed these important preliminary points regarding the framework of our appellate scrutiny in this case, we address in more comprehensive detail the merits of the commercial speech issues the parties and the Superior Court have formulated for our appellate review and determination.

In its most recent decision concerning commercial speech, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra,* the Supreme Court of the United States has traced through all of its cases decided since *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) the developing clarification of the nature and extent of the protection of "commercial speech from unwarranted governmental regulation, conferred by the "First Amendment, as applied to the States through the Fourteenth Amendment." ____ U.S. ____, at ____. The Court summarized the results as follows:

> "In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within

> that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* at ____.

We therefore apply this four-part analysis to those provisions of the Maine Act challenged, here, as being a governmental regulation of commercial speech contravening First-Fourteenth Amendment protections.

II-C-1. The Challenge to Section 1314 of the Maine Act.

The Superior Court Justice decided that the First-Fourteenth Amendment protections afforded commercial speech were violated by the provisions in Section 1314(1):

> "A person may not procure or cause to be prepared an investigative consumer report on any consumer unless:
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> > ". . . That person has provided the consumer with clear and conspicuous written notice of the requested procurement or preparation and the consumer has, in turn, given or signed written authorization for each procurement or preparation . . . ."

The "investigative consumer report" for which the user must arrange to have this prior written consent of the consumer is defined in Section 1312(7) as

> "a consumer report or portion thereof which includes information bearing on a consumer's character, general reputation, personal characteristics or mode of living which is obtained through personal interviews with neighbors, friends or associates of the consumer or with others with whom he is acquainted or who may have knowledge concerning any such items of information or by other means."

We have already explained that despite indirectness in the manner in which Section 1314(1) restrains commercial speech by Equifax (the indirectness being that the restraint is effectuated through conduct required of users and consumers), the restraint is nevertheless actual, substantial and content-based. Manifestly applicable, then, is the "four-part analysis" delineated in *Central Hudson Gas & Electric Corp., supra.*

We first inquire whether the commercial speech thus restrained by Section 1314(1) is such commercial speech as is constitutionally protected. *Central Hudson Gas & Electric, supra,* establishes that commercial speech which (1) is "more likely to deceive the public than to inform it," or (2) is "related to illegal activity" is excluded from First-Fourteenth Amendment protection. *Id.* at ____.

Neither Section 1314(1) itself nor the elaboration of it provided by the definition of "investigative consumer report" says anything that refers in terms to deceptive or misleadingly inaccurate information, or that purports to confine the applicability of the restraint imposed to the reporting of such information. Yet, the defendant Attorney General contends the commercial speech regulated by Section 1314(1) must be held excluded from First-Fourteenth Amendment protections, as being "more likely to deceive . . . than to inform." Basically, the Attorney General's position is that by their very nature as aggregates of information relating to the personal characteristics of a consumer that are collected from interviews with third persons and by other means inviting highly subjective judgments, investigative reports will most of the time, if not always, be inaccurate and misleading and, therefore, should not be treated as constitutionally protected commercial speech.

We reject this argument. We cannot "presume" that inevitably, or generally, investigative consumer reports are deceptive or misleading, especially since the particular record before us refutes any such "presumption" by its affirmative showing, unrefuted, that material inaccuracies turn up in only a small number of investigative consumer reports.[9]

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[9]Mr. Ronald Marshall, Vice-President in charge of health and disability underwriting for Paul Revere Life Insurance Company, testified that less than one percent of investigative consumer reports used by his company contain er-

We do not overlook that in *Ohralik v. Ohio State Bar Association, supra*, the Supreme Court of the United States was willing, without actual evidentiary support in that case, simply on the basis of the general literature and Federal Trade Commission reports to regard the activity there prohibited, i.e., in-person solicitation by an attorney, as "inherently conducive to overreaching and other forms of misconduct." *See Ohralik, supra,* 436 U.S. at 459, n. 23. *Ohralik,* however, involved conduct specially within the knowledge and expertise of the Court itself: the behavior of lawyers and the effects thereof on clients.

As to the particular information at issue in the attack on Section 1314(1), we conclude that the general body of secondary literature, or even the congressional legislative history of the Federal Act enacted in 1970, is not too helpful. This information relates to the time when the consumer reporting industry was unregulated. With the advent of tighter federal regulations in regard to reporting **methodology,** as distinguished from the informational **content** of reports, — such as requirements for notification of a report's preparation, disclosure of the substance of the report upon request, imposition of strict requirements as to record keeping and filing, and imposition of civil and criminal liability for failure to comply with these regulations, — we cannot "presume" that the abuses present before and during the early 1970's still persist today, either nationally or in the State of Maine.

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roneous information. Gaylord Paine, Senior Vice-President of Connecticut Mutual Life Insurance Company testified that based on verification checks made by reference to other sources, his company found that it rarely receives investigative consumer reports containing inaccuracies. Furthermore, other testimony showed that disgruntled consumers who are refused insurance or charged higher premium rates usually complain or inquire, and that the process of verifying the information can reveal errors or substantiate the reported information. Evidence also indicated that out of 140,000 reports issued in the period from June 1974 to December 1977 in Maine, 61 consumers challenged the accuracy of the reports. Of these 61 challenges, Equifax reinvestigated 45 cases, with the results that 16 were found accurate and 29 were found to require changes in the information, — changes in items such as estimated mileage in driving to work, earned income, number of apartments in a building, or degree of alcohol use. The record also revealed that with respect to those companies whose representatives testified, approximately 95% of the applicants receive insurance at the standard rating, — a percentage tending to show that prejudicially inaccurate reporting is not extensive.

In applying the first step, then, of the *Central Hudson* four-step analysis, we conclude that constitutionally protected commercial speech[10] has been subjected under Section 1314(1) to content-based governmental restraint.

We proceed, then, to the second step: whether the restraint thus imposed by Section 1314(1) furthers a governmental interest **substantial** in nature. As *Central Hudson* says: "The State must assert a substantial interest to be achieved by restrictions on commercial speech." *Id.*, at ——.

Defendant Attorney General maintains that the governmental interest sought to be achieved by Section 1314(1) is the protection of the citizenry's enjoyment of "privacy." That this is a substantial governmental interest is illustrated, says the Attorney General, by the constitutional and tort law protections afforded "privacy."

One fundamental lesson we learn, however, from the constitutional and tort law approaches to the protection of "privacy" is that as it is used in common parlance, privacy is an elusive concept. Hence, to avoid confusion, indeed error, in analysis we must recognize that constitutional and tort law protects only **particular facets** of what the average person may think of as a "right to privacy."

For example, in those cases where government is acting in a manner claimed by a person to be violative of his "privacy", so that a constitutional claim can be made because of the presence of governmental action, the Supreme Court of the United States has emphasized that only **particular "zones"** of privacy have constitutional protection. *See Paul v. Davis*, 424 U.S. 693, 712-13, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). In *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) the "zones" of privacy constitutionally protected, because deemed fundamental or substantial, were classified as comprising generally: (1) matters so personally intimate or worthy of secrecy that government should be precluded from making, or requiring, public disclosure of them and (2) the sphere of decision-making in inti-

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[10]The Attorney General has made no contention that the commercial speech regulated by Section 1314(1) lacks constitutional protection as being "related to illegal activity."

mate personal matters of such importance as those "relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.*, at 600, n. 26; *see also Paul v. Davis, supra,* at 713.

Similarly, in the law of torts **only particular** "areas" of interest comprehended within what is commonly denominated "privacy" have been marked out as legally protected. These "areas" are: (1) the interest in physical or mental solitude or seclusion, as protected from an intrusion thereon which is intentional and yields a highly offensive result; (2) the interest that certain kinds of facts about one's intimate person, or secrets, shall not be given public disclosure; (3) the interest of a person not to be falsely regarded by the public, an interest which is protected against conduct that depicts a person to the public in a false light; and (4) the interest of a person in his name or likeness, which is protected against appropriation for another's benefit or advantage. *See Nelson v. Maine Times,* Me., 373 A.2d 1221, 1223 (1977); *Estate of Berthiaume v. Pratt,* Me., 365 A.2d 792, 794 (1976); Restatement (Second), Torts § 652A-E.

It would appear, then, that the above delineated particular "zones" or "areas", as intruded upon by the particular conduct described, represent the extent of a governmental interest in protecting "privacy" that may fairly be taken as being **substantial**.

As we have already explained, the regulatory thrust of Section 1314(1) is concentrated upon **investigative** consumer reports. By definition such reports provide

> "information bearing on a consumer's character, general reputation, personal characteristics or mode of living . . . obtained through personal interviews with neighbors, friends or associates of the consumer or with others with whom he is acquainted or who may have knowledge concerning any such items of information or by other means." 10 M.R.S.A. § 1312(7).

From this definition it is plain to us that the restraints imposed by Section 1314(1) safeguard only minimally and tangentially, if at all, those particular "zones" or "areas" of "privacy" (from those particular kinds of intrusions) that, as illustrated by con-

stitutional doctrine and the law of torts, generate a governmental interest of protection that may fairly be deemed substantial. This being so, Section 1314(1) must be held unconstitutional because either: (1) the restraint it imposes really does not at all further a substantial governmental interest or (2) if we acknowledge that the restraint may have a degree of relation to a substantial governmental interest, under the third and fourth steps of the *Central Hudson* four-step analysis the restraint does not directly advance that substantial interest and is more extensive than is necessary to serve it.

II-C-2. The Attack on Section 1321.

The Superior Court Justice decided that Section 1321 as it read in "the original and amended [Maine] [A]cts [is] . . unconstitutional as violative of the First Amendment."

The original version of Section 1321 contained, among others, the following categories of prohibited information: "uncorroborated hearsay", "personal life style", and "philosophy."[11] The 1978 amendment deleted these categories. It also made changes pertinent to our present inquiry in other parts of Section 1321, as follows: in the Section 1321(1) prohibition of information "not reasonably relevant to the purpose for which it is sought"; in the Section 1321(2) prohibition against a consumer reporting agency's or a merchant's collection, evaluation, preparation, use or reporting of information which is "obsolete", or which either the agency or the merchant has "reason to

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[11]10 M.R.S.A. § 1321(1) (Supp. 1977-78) (repealed) provided:

> **"Information relative to criminal charges.** Neither a consumer reporting agency nor a merchant shall prepare, use or report information which is not reasonably relevant to the purpose for which it is sought.
>
> "Neither a consumer reporting agency nor a merchant shall collect, evaluate, prepare, use or report information relative to an arrest or a criminal charge unless there has been a criminal conviction for such offense, or information based on **uncorroborated hearsay,** or information about a consumer's race, religion, color, ancestry, ethnic origin, **personal life style, philosophy** or political affiliation, except to the extent required by governmentally imposed record keeping requirements." (emphasis added)

know is inaccurate or irrelevant"; and in the Section 1321(3) requirement that consumer reporting agencies and merchants follow procedures to exclude inaccurate and irrelevant information.[12]

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[12]By the amendment in 1978, the full text of 10 M.R.S.A. § 1321 (Supp. 1979-80) was changed to read:

> **"§ 1321. Prohibited information, accuracy, relevancy and obsolescence of information in reports**
>
> **"1. Reporting agencies.** No consumer reporting agency shall prepare, use or report information:
>
> **"A.** Relative to a consumer's race, religion, color, ancestry, ethnic origin, sexual preference or orientation, political affiliation or political beliefs, except to the extent required by governmentally imposed record-keeping requirements or to the extent necessary to prepare, use or report information relative to an arrest or criminal charge, as provided in paragraph B, or a consumer's marital status; or
>
> **"B.** Relative to an arrest or a criminal charge or admission of wrong doing in connection with a detention pursuant to Title 17, section 3521, unless there has been a criminal conviction for that offense or unless the charge is still pending, and, additionally, when the information reflects sexual preference or orientation, unless the conduct which is the basis of the arrest or criminal charge constitutes an offense under the provisions of the Maine Criminal Code or comparable law of another jurisdiction.
>
> **"2. Irrelevant or inaccurate information.** A consumer reporting agency shall not prepare, use of report information which it has reason to believe is inaccurate or not relevant to the purpose for which it is sought.
>
> **"3. Procedures to insure report accuracy.** A consumer reporting agency shall adopt and follow reasonable procedures designed to assure maximum possible accuracy of the information concerning the individual to whom the report relates and exclude from its files inaccurate information, information which cannot be verified, and information which it has. . . reason to believe is not relevant to the purpose for which it is sought.
>
> **"4. Items prohibited in reports**
>
> **"A.** Except as authorized under paragraph B, no consumer reporting agency may make any consumer

Defendant Attorney General makes no contention on appeal that the Superior Court Justice committed error by deciding that parts of the original version of Section 1321 unduly restricted constitutionally protected commercial speech. Regardless of

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report or investigative consumer report containing any of the following items of information:

"(1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than 14 years;

"(2) Suits and judgments which from date of entry, antedate the report by more than 7 years or until the governing statute of limitations has expired, whichever is the longer period;

"(3) Paid tax liens which, from the date of payment, antedate the report by more than 7 years;

"(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than 7 years;

"(5) Records of arrest or of conviction of crime which, from date of disposition, release or parole, antedate the report by more than 7 years;

"(6) Information regarding drug or alcoholic addiction unless such information is provided by a licensed practicing physician and the information relating to such addictions does not antedate the consumer report or investigative consumer report by more than 7 years;

"(7) Information relating to past confinement in a mental institution when the date of last confinement antedates the report by more than 7 years; and

"(8) Any other adverse item of information which antedates the report by more than 7 years.

"B. The provisions of paragraph A are not applicable in the case of any consumer credit report to be used in connection with:

"(1) A credit transaction involving, or which may reasonably be expected to involve, a principal amount of $50,000 or more;

whether this omission may suggest a concession by defendant on that specific issue (and in all reasonable likelihood it does not),[13] we will nevertheless evaluate the correctness of the Justice's conclusions regarding those now repealed categories.

We are induced to do this by the nature of plaintiffs' constitutional challenge and the kinds of interests involved in this case. Plaintiffs contend that on their face the repealed parts of Section 1321 transgressed the constitutional protections afforded speech, as having restricted or chilled the compilation and reporting of information and also as having subjected consumer reporting agencies to potential civil liability and criminal penalties in the event they might have reported prohibited information at any time after the Maine Act went into effect on October 24, 1977. It may well be that as to the first ground of this facial attack, plaintiffs are no longer subject to the direct restrictions, or any chilling effects, arising from the repealed categories of prohibited information. Yet, as to the second ground, under

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"(2) The underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $50,000 or more except that the provisions of paragraph A, subparagraphs 6 and 7 are not applicable in connection with the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $25,000 or more;

"(2-A) The underwriting of disability income insurance involving, or which reasonably may be expected to involve, an indemnity for total disability of $1,000 per month or more; or

"(3) The employment of any individual at an annual salary which equals, or which may reasonably be expected to equal, $20,000 or more.

"5. Listing of denial of credit prohibited in certain situation. No consumer reporting agency shall issue a consumer report which lists a person as having been denied credit if the sole reason for such denial is lack of sufficient information to grant credit, unless the report states that the denial was for such reason."

[13]We infer that defendant intended no such concession because he has so vigorously attacked on grounds of mootness the Superior Court's adjudication holding the repealed categories too vague to meet the Fourteenth Amendment due process of law requirements.

Sections 1322 and 1323 of the Maine Act which condition civil liability upon a failure to comply with the Act, plaintiffs could be subjected to future suits based upon their having previously reported information prohibited by the repealed categories.[14] Since plaintiffs' challenge is facial in nature and pertains to portions of the statutes under which, despite their having been repealed, plaintiffs may still be subject to suit, and since we must in any event adjudicate the general validity of large portions of the statute that closely resemble the repealed sections in form and substance, we think we have responsibility to review the Superior Court Justice's decision in **all** of the respects that he found unconstitutional abridgments of commercial speech.

The text of Section 1321 makes evident that the bulk of its regulation is directed to the **content** of speech which, even as commercial speech, is constitutionally protected insofar as it is speech that is far more likely to be informative than deceptive. Section 1321(A) and Section 1321(B) forbid the inclusion of certain types of information, such as race, political affiliation, criminal record, **regardless** of their truth or falsity; Section 1321(4) likewise prohibits the reporting of truthful, accurate public record information.

Potentially, too, if not plainly so, the provisions in Sections 1321(2) and 1321(3) regarding the exclusion of "irrelevant" information may infringe upon constitutionally protected commercial speech, since the "irrelevance" of information does not inevitably, or with strong likelihood, cause it to be deceptive or misleading.

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[14]We recognize that Section 1324 of the original and amended Maine Act imposes a general two year statute of limitations upon actions pertaining to any liability created under the Maine Act, and that the amendments to the Act took effect 2 years ago, on July 6, 1978. An exception to the two year period of limitation, however, keeps alive the possibility that plaintiffs could be sued under the original version of Section 1321(1). This exception applies where the consumer reporting agency, has

> "materially and willfully misrepresented any information required under this Title to be disclosed to an individual and the information so misrepresented is material to the establishment of the [agency's] liability." 10 M.R.S.A. § 1324 (Supp. 1979-80).

In such case, the two year period of limitation **commences** at the time the individual discovers the misrepresentations.

On the other hand, to the extent that portions of Section 1321 require information to be accurate, as in Sections 1321(2) and 1321(3), and verified, as in Section 1321(3), those provisions in terms pertain to the State's interest that commercial speech be neither deceptive nor misleading. Thus, without need for further discussion of these portions of Sections 1321(2) and 1321(3) concerned with the accuracy and truthfulness of information, we decide that, within the **commercial** speech framework in which our judicial review is proceeding, those provisions are valid regulations, as being precisely directed to such commercial speech as is excluded from constitutional protection. *Central Hudson, supra.*

To answer the question whether other particular restrictions in Section 1321 should also be upheld, on the ground that they regulate commercial speech that is excluded from constitutional protection as "relating to illegal activity", *Central Hudson, supra,* we must analyze more closely both the particular categories of prohibited information delineated in Section 1321(1) (A) and the scope and meaning of "unlawful" or "illegal" activity.

Except for several categories of prohibited information in Section 1321(1) (A), all the **other** types of information that current Section 1321 prohibits **consumer reporting agencies** from including in their reports the current Maine Act nonetheless permits the **users** of reports to take into account in making their decisions about consumers in particular transactions. However, as the defendant Attorney General points out, reliance by **certain users** (decision makers) upon **certain** categories of information is made **independently** illegal by other statutes. For example, the Maine Human Rights Act prohibits discrimination based solely upon age, sex, race, religion, color, physical or mental handicap, ancestry, or national origin in the specific areas of credit extension, employment, housing and public accommodations.

The contention is, therefore, that the communication of information prohibited by Section 1321(1) (A) is a regulation of commercial speech lacking constitutional protection because it "relates to illegal activity" insofar as users to whom the speech is directed may use the information communicated as a basis for illegal discrimination.

We reject any such rationale to justify the suppression of commercial speech effectuated by Section 1321(1) (A). We reach this conclusion through analysis of *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973), (hereinafter "Press I"), as it was distinguished by the Pennsylvania Supreme Court in *Commonwealth of Pennsylvania v. Pittsburgh Press Company*, 483 Pa. 314, 396 A.2d 1187 (1979), *cert. den.* ____ U.S. ____ (19__), hereinafter "Press II").

In *Press I* the Supreme Court of the United States decided that because sex discrimination in employment was an illegal commercial activity, as defined by an independent section of the City of Pittsburgh's Human Relation Ordinance, the newspaper could be constitutionally prohibited from publishing an advertisement placed by an employer seeking applications for employment by reference to gender. In *Press II* the Pennsylvania Human Relations Commission challenged the publication by the Pittsburgh Press of "situation wanted" advertisements in which job-seekers stated their qualities in hopes of securing employment. These advertisements occasionally contained references to the race, color, religion, age and sex of the person seeking employment. The Commission argued that since discrimination on the basis of race, color, creed, ancestry, age, sex, or national origin was unlawful under the Pennsylvania Human Relations Act, the publication of "situation wanted" advertisements containing the above information was illegal activity, as violative of a provision of the Human Relations Act forbidding the aiding and abetting of unlawful discrimination. In support of this argument, the Commission cited *Press I*.

The Pennsylvania Supreme Court rejected the Commission's contention. That court saw a critical distinction between *Press I* and *Press II*. In *Press I* the newspaper was placing the prospective **employer's** advertisements in columns segregated by gender, whereas in *Press II* the newspaper published the prospective **employee's** advertisements. Thus, in *Press I* the newspaper advertising, as placed by the employer, was directly involved in the **employer's** illegal activity of hiring by reference to gender. In *Press II*, however, the newspaper's publishing of advertising placed by job-seekers could be deemed an aiding and abetting of

illegally discriminatory **hiring by an employer** only if it be assumed that the mere existence of such advertising by job-seekers tended to cause employers to make illegally discriminatory hiring decisions and, therefore, that prohibiting such advertising would reduce unlawful discrimination in hiring. The Pennsylvania Supreme Court concuded that this assumption was "too speculative to justify [the] direct restriction on the advertiser's freedom of expression." *Id.*, at 1190.[15]

We think the analysis in *Press II* is correct and that its reasoning should control the case at bar. We are not persuaded that there is a distinction, here, because evidence shows that users of reports meet periodically with Equifax to discuss the general informational content of consumer reports. Such connection between Equifax and the users of its reports does not approach the symbiotic relation between the newspaper and the advertising employers in *Press I*, where the employer in every instance dictated to the newspaper the content of the advertisement. In the present case, the evidence reveals that users are consulted only occasionally by Equifax's "marketing department" regarding the general scope of the information desired.

Unlike the situation in *Press I*, nothing suggests here that users have specifically requested information falling with the narrow limits of the independently established criteria of illegal discrimination. The user's feedback relates, as far as can be discerned from the record, to general categories tailored closely to the purpose for which the report is sought. For example, life insurers request standardized types of information relating to occupation, financial status, health, and general stability; automobile insurers expect information relating to users of the automobile, driving record and habits and so forth; employers desire information relevant to the applicant's previous work experience, reliability, and so forth. Moreover, under its own internal policies, Equifax prohibits the inclusion in any report of

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[15]This would be true particularly with respect to facts that would be readily apparent to a prospective employer from the employment application or personal interview: age, sex, race, color and so forth. As to such facts, the regulation frustrated the advertiser's freedom of expression since the employer would be likely to know in any event of the information that was prohibited from being part of an advertisement.

information falling within two of the "unlawful" criteria, i.e., race and religion, except in those extremely rare circumstances where that information may have legitimate bearing on the decision to be made by a user.

We therefore conclude that the provisions in Section 1321(1)(A) cannot be sustained on the ground that the commercial speech it suppresses is excluded from constitutional protection as commercial speech "relating to illegal activity." In itself, the act of reporting the information is not illegal. Moreover, that a user merely becomes aware of the factors addressed by Section 1321(1)(A) is not illegal. It is only when the user bases a discriminatory decision on such factors that illegal activity occurs, and nothing in evidence shows that users are generally susceptible to improper influence merely by becoming aware of them. Hence, there is no fair basis for the "presumption" the defendant Attorney General seems to advocate, that a user's awareness of the factors delineated in Section 1321(1)(A) as the criteria for prohibiting a flow of information is the equivalent of illegal decision-making by the user.

We turn, then, to the other three steps in the *Central Hudson* "four-part analysis": whether the governmental interests asserted in support of the prohibition of constitutionally protected commercial speech required by Section 1321 are substantial, and, if so, whether the prohibitions directly advance the asserted state interests without being more extensive than necessary to serve them. For purposes of convenience and brevity, we discuss in essentially a unitary way these analytically separate inquiries that in the present context are closely interwoven.

The regulatory approach in Section 1321 manifests a governmental conception that in order to prevent intrusions upon "privacy" by unlawful discrimination and improperly influenced decision-making it is necessary to exclude entirely various items of information from the consideration of users and, therefore, to require the purging of such data from consumer agency reports.

The record in this case fails to demonstrate that such blanket exclusion from consumer agency reports of the kinds of infor-

mation under scrutiny will directly advance the asserted state interests.

Except for those classes of information that other statutes make it independently illegal for users to rely upon in reaching particular kinds of decisions, Section 1321(1) (A) requires the exclusion from consumer reports of information users can **lawfully** make the basis of their decisions.[16] It would seem, too, that despite the prohibitions of Section 1321(1) (A), users can readily obtain such information through sources other than consumer agency reports.[17] Even on the assumption that recipient users may have no other ready access to the prohibited information, we cannot "presume" that their acquiring it from consumer reporting agencies would inevitably, or most likely, cause them to be prejudiced in their making of decisions. The evidence in the record before us is to the contrary.[18]

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[16]Although the repealed version of Section 1321 prohibited **both** the reporting of such information by the consumer reporting agency **and** the **use** of such information in economic decision making, the current Section 1321 omitted reference to the **use** of the information, thereby making it lawful unless otherwise prohibited, and focused exclusively upon the **reporting** of the information.

[17]Evidence adduced in this case showed that users, particularly insurers, have multiple sources of information, including a personal application form, personal interview and an agent's evaluation. Prohibited information may come to the user's attention through such an application, by an independently solicited doctor's report, or as a result of a personal interview. *See Pittsburgh Press II, supra.* An insurance agent would not be required to obtain a consumer's prior written authorization in order to report information bearing upon that consumer's general reputation, or personal character, or mode of living. This is particularly true in regard to the **public record** information that is made a prohibited category under Section 1321(4) (A).

[18]The evidence shows that insurance underwriters frequently are exposed to a range of information about a particular applicant that may or may not be relevant. If such information is not relevant to the decision at hand, but includes some of the prohibited facts, the information need not affect the judgment, for example, of a trained underwriter whose principal concern is to assess the risk that the applicant presents. Thus, Mr. Gaylord Paine, Senior Vice-President of Connecticut Mutual Life Insurance Company and an expert in the field of underwriting, testified that sexual preference or orientation alone may not be rel-

In this connection, we do not overlook that Section 1321 (4) (A) is substantially identical to a corresponding provision in the Federal Act. We therefore look to what appears in the Congressional legislative history as potential support for the constitutional validity of Section 1321(4) (A).

From that investigation we discern that even though Section 1321(4) (A) may further governmental interests that may be deemed to be substantial, two factors lead to the conclusion that Section 1321(4) (A) unduly abridges constitutionally protected commercial speech. The first factor is that Congress enacted the Federal Act in the early part of the 1970's, at a time when commercial speech was afforded no constitutional protection whatever. *Virginia Pharmacy Board, supra,* the first case bringing commercial speech within the protection of the First-Fourteenth Amendments, was not decided until 1976. In particular, consumer reports were then characterized as commercial speech

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evant to an underwriter's assessment of a particular individual risk but may be considered important and relied upon if, in combination with other information, it suggests violent or criminal tendencies. Similarly, political affiliation or beliefs will usually also be irrelevant, and be disregarded by evaluating underwriters, unless a particular application involves active participation in a violence-prone group, and in such case, depending upon the type of insurance sought, it would be material to the determination of risk. Furthermore, the record discloses that, generally, underwriters discovering adverse information in a consumer report take steps as a matter of course to verify that information by checking independent corroborating sources (such as medical reports on the application form), or by requesting a supplemental consumer report. Not only the accuracy of the reported information is checked by this procedure, but additional facts about other aspects of the applicant may corroborate an adverse inference drawn from the initial report. Lastly, cogent evidence of record shows that only in a small percentage of cases has adverse information in a consumer report caused an outright denial of the benefit sought. For example, Frank Fowles, President of Maine Bonding & Casualty Company, formerly one of the largest customers in Maine of Equifax, testified (at the November 1977 preliminary injunction proceeding) that:

> "As far as rejections are concerned, I would say that a very, very small percentage [of consumer reports cause an applicant to be denied an insurance policy]; as far as determinations about the classification of the policy leading to a need to have some adjustment in the premium, a considerably higher proportion of the policies would be in this latter category. . . "

and, therefore, as commercial speech they were held to lack constitutional protection. Now that it has been established that the fact alone that speech may be commercial does not strip away constitutional protection, Section 1321(4) (A) of the Maine Act, and its Federal Act counterpart (15 U.S.C. § 1681c), must be evaluated anew in accordance with different controlling principles.

In this reassessment, requiring closer scrutiny of the governmental restraints imposed on commercial speech, we find that the Congressional legislative history fails to provide support for the pivotal proposition underlying Section 1321(4) (A)—the assumption that inevitably, or most probably, users of consumer reports will be improperly influenced if such reports communicate to them the type of information that Section 1321(4) (A) prohibits from inclusion in consumer reports.

The constitutional infirmity of Section 1321(4) arises, essentially, from its unduly broad sweep in going so far as to prohibit the communication of truthful, accurate facts, even those in public records, as a means of seeking to assure that decision making by users will have a proper, not an improper, basis. This governmental interest could have been adequately served had the legislature intruded less extensively upon constitutionally protected commercial speech by focusing on the decision-making process itself. For example, the Maine Act could have made it illegal for users to base their decisions on particular kinds of information, or it could have required users to provide specific justification for decisional action involving any type of information deemed "suspect." The resort to a blanket restriction, or prohibition, of constitutionally protected commercial speech thus violates the *Central Hudson* mandate that the regulatory scheme **directly advance** the asserted state interests and be **no more extensive than is necessary** to serve them.

We now address specifically those portions of the original and amended Section 1321 that purport to make "relevancy" the criterion of a category of prohibited information. We have under consideration those parts of Section 1321 we previously mentioned at p. 28 and p. 32 of this opinion, as well as the portion of amended Section 1323(2) providing for additional dam-

ages for each reported item of information that the agency has "reason to believe was not relevant to the purpose for which it was sought."

The determination of what information is relevant in a particular instance may not be easy, or indeed possible, until all facts from all sources have been assembled and analyzed. Insurance underwriters who testified in the instant proceeding, for example, recognized that the determination of relevancy in particular circumstances may be a delicate or difficult determination. *A fortiori,* consumer reporting agencies, which only collect and report information, are even less able to differentiate in a large percentage of cases the "relevant" from the "irrelevant" information. Even the qualification added by the 1978 amendment—that the consumer reporting agency must have "reason to believe" that the information is not relevant before it will be held accountable for including it in a consumer report—is insufficient to overcome the unwarranted intrusion these provisions effectuate against constitutionally protected commercial speech. Although the chilling effect of the pre-1978 version has been relieved somewhat by the amendment, the statute's provision still sweeps broadly by use of a generalized standard which, in the context in which it is to operate, is difficult to apply. That a consumer agency may have reason to believe that an item of information might not be relevant does not establish that there is irrelevance. Moreover, even if the information may be actually irrelevant, a consumer report otherwise constitutionally protected as speech cannot be made to lose consitutional protection solely because some of the information in it may be irrelevant for the purposes at hand. The foundational premise upon which such a purported suppression of speech could be warranted is that users who receive irrelevant information must be deemed incapable of dealing with it or of avoiding being adversely predisposed toward a consumer applicant because of it. The record before us does not permit such an assumption. Irrelevant information does not equate with false, or misleading, information. Neither can a "presumption" be supportable that the irrelevance of information makes it highly likely to be misleading, or even negative. Thus, the regulation in Section 1321 that requires a reporting agency to exclude from its reports information it has

reason to believe is not "relevant" to the purpose for which it was sought infringes too sweepingly upon constitutionally protected commercial speech.

Finally, we comment specifically upon one aspect of the repealed version of Section 1321 that we have not yet discussed. Under the Maine Act as originally enacted Section 1321 prohibited consumer reporting agencies from making and selling reports containing expressly identified categories of prohibited information, and it also prohibited users from using reports containing such information:

> "Neither a consumer reporting agency nor a merchant shall collect, evaluate, prepare, use or report . . . information based on uncorroborated hearsay, or information about a consumer's . . . personal life style, philosophy . . . " 10 M.R.S.A. § 1321(1) (Supp. 1977-78)[19] (repealed).

Thus, the prohibition of speech by the consumer reporting agency was closely tailored to the prohibition against the use of certain criteria by merchants. Such type of regulation tends to go far beyond, if it touches at all, any of those "zones" of "privacy" that, as we discussed earlier, government may have a substantial interest in protecting. Information "about a consumer's personal life style" or "about a consumer's philosophy" relates to matters tending to be **publicly** known, as the definition of "investigative consumer report" confirms by referring to the sources of such information as being "neighbors, friends, . . . associates. . . or . . . others with whom [the consumer] is acquainted or who may have knowledge concerning any such items of information . . . " In short, the regulation is not narrowly drawn to ferret out only those parts that directly bear upon such par-

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[19]The other categories of prohibited information in the original version of Section 1321—race, religion, ethnic origin, color, ancestry, and political affiliation—were carried forward into the amended version. The only distinction between the repealed and amended Section 1321 with respect to these other categories is that under the original Section 1321 such categories were expressly made unlawful criteria for **all** merchants, or users. Under the amended version, which does not prohibit "merchants" from using such information, those particular categories of information would be unlawful criteria only where so declared by an independent statute, e.g., the Maine Human Rights Act.

ticular "areas" of "privacy" fairly deemed to make a claim for governmental protection that is substantial, as illustrated by the protections afforded constitutionally or by the law of torts.

We conclude, therefore, that the original version of Section 1321 is unconstitutional as an impermissible restriction upon commercial speech protected under the First-Fourteenth Amendments.

In summary, our decision is that the Superior Court Justice correctly adjudicated that the following provisions of the Maine Act transgress the protections afforded commercial speech by the First-Fourteenth Amendments: original, and amended, Sections 1314(1) and 1321(1); those particular provisions in original, and amended, Sections 1321(2) and (3) prohibiting the inclusion in a consumer agency report, or retention in its file, of information the reporting agency "has . . . reason to believe is not relevant to the purpose for which it is sought"; original and amended, Section 1321(4) (A). We order added to these the part of amended Section 1323(2) which allows for the imposition of additional damages for each "irrelevant" item that the consumer reporting agency supplies.

II-D. The Challenge to Section 1313.

We proceed to plaintiff's attack, levelled by cross appeal, on the constitutionality of Section 1313 of the Maine Act.[20] The contention, as to which the Superior Court Justice made no decision, is that Section 1313 must be nullified as **facially** violative

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[20]10 M.R.S.A. § 1313 (Supp. 1979-80) provides:

"A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

"1. **In response to the order.** In response to the order of a court having jurisdiction to issue such an order;

"2. **In accordance with the written instruction of the consumer.** In accordance with the written instructions of the consumer to whom it relates;

"3. **To certain persons.** To a person who it has reason to believe:

"A. Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer;

of the First-Fourteenth Amendment protections afforded commercial speech.

Section 1313 authorizes a consumer reporting agency to furnish a consumer report **only** in the particular circumstances therein provided. These limitations may give surface suggestion that Section 1313 unduly abridges constitutionally protected commercial speech. From closer examination of them, however, we conclude that the infirmity is more apparent than real. The reason for our conclusion is that regardless of any of the other restrictions imposed, Section 1313(3) (E) allows a consumer report to be furnished to any person whom the consumer reporting agency "has reason to believe . . . has a legitimate business need for the information in connection with a business transaction involving the consumer." In effect, then, this provision overrides all the other limitations and permits consumer reports to be furnished in a circumstantial context so essentially unlimited that it may fairly be regarded as leaving commercial speech practically unrestricted. Although circumstances lying outside Section 1313(3) (E), may be hypothesized in which the furnishing of consumer reports would be prohibited, thereby to make it arguable that restraints are imposed on constitutionally protected commercial speech, we refuse to nullify Section 1313 in **all** its **applications**, i.e., **facially,** merely because of such hypothetically conceived particular applications likely to be marginal in nature and rarely to occur. We therefore leave for that future case which will involve as reality what may presently be hypothesized by imagination, namely, the determination whether Sec-

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"**B.** Intends to use the information for employment purposes;

"**C.** Intends to use the information in connection with the underwriting of insurance involving the consumer;

"**D.** Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

"**E.** Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

tion 1313 **as so applied** may transgress, without warrant, constitutionally protected commercial speech.[21]

III. OTHER CONSTITUTIONAL CHALLENGES.

Regarding those provisions of Section 1314 and of Section 1321 that we have held unconstitutional as violative of protections given commercial speech by the First-Fourteenth Amendments, we find it necessary to decide other contentions that those same provisions contravene federal protections of substantive due process, the equal protection of the laws and interstate commerce. Hence, we confine our further review to the constitutional attacks on such other provisions of the Maine Act as we have not previously invalidated.

III-A. The Fourteenth Amendment "Vagueness" Issues.

By their cross appeal plaintiffs have challenged the phrase in Section 1326 of the original Act, "person not authorized to receive that information" and the phrase in Section 1323(2) of the original Act, "$100 for each item of erroneous information reported which was the result of final action", as being too vague to accord with the "due process of law" mandate of the Fourteenth Amendment. On each of these issues the Superior Court Justice ruled against plaintiffs' contention.

Plaintiffs' claim of unconstitutional vagueness in the phrase "person not authorized . . ." fails because of the 1978 amendment to Section 1326. As pertinent, that section originally read:

> "any officer or employee of a consumer reporting agency who knowingly and intentionally provides information concerning an individual from the agency's files **to a person not** authorized to receive that information shall be fined . . . or imprisoned . . . ." 10 M.R.S.A. § 1326 (Supp. 1977-78) (amended 1978) (emphasis added)

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[21]This approach is in line with the reluctance of the Supreme Court of the United States to extend to the area of **commercial** speech the "chilling" doctrine applicable to other modes of constitutionally protected speech, which allows "a person . . . [to] challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380, 97 S.Ct 2691, 53 L.Ed.2d 810 (1977); *see Central Hudson Gas & Electric Corp., supra*, n. 8 at ____.

The 1978 amendment changed the language as follows:

> "any officer or employee of a consumer reporting agency who knowingly and intentionally provides information concerning an individual from the agency's files **to a person not authorized, within the meaning of sections 1313 and 1314 subsection 1,** to receive that information shall be fined . . . or imprisoned . . . ." 10 M.R.S.A. § 1326 (Supp. 1979-80) (emphasis added)

The language given emphasis replaced the prior language challenged by plaintiffs as vague. The amending Act, P.L. 1977 c. 677, was entitled "AN ACT to Clarify and Define Certain Existing Provisions of the Maine Fair Credit Reporting Act." The "Statement of Fact" accompanying Legislative Document No. 2192, from which the amending Act was drawn, stated that this change "clarifies" the meaning of "authorized" in Section 1326. We think it plain, then, that the amendment purported to express what the legislative intendment had been from the outset. This kind of clarification requires rejection of the vagueness challenge here made by plaintiffs which involves, we stress, no claim of rights deriving from reliance on the terms of the statute prior to the 1978 amendment.

We also turn aside plaintiffs' "vagueness" attack on the provision in the original version of Section 1323(2) authorizing an award of special damages as the Court may find appropriate, but in any event

> "not less than $100 for each item of erroneous information reported which was the **result of** final action." (emphasis added)

As to the alleged vagueness in the language emphasized, which appears to make erroneous information reported the "result of" rather than, as would make sense in the context, the factor which "results in" final action, the Superior Court Justice decided that the provision could have been written more artfully but nevertheless

> "a reasonable person would conclude that a reporting agency would be fined for each item of erroneous information **resulting in** final action by the user, that is, [which is] a determining factor of the user's decision."

We agree, and we add as a supporting consideration the subsequent amendment of Section 1323(2), [22] which, although of more extensive scope, includes a reiteration of legislative intendment that the agency be penalized for each separate infraction that may have **contributed** to a user's adverse decision.

III-B. The Supremacy Clause Challenges.

Plaintiffs contend that the regulatory scheme and purposes of the Federal Act cannot be reconciled with divergent provisions of the Maine Act listed as follows.

1—The original Section 1317(4) (C), which required that upon the discovery of erroneous information in a report, a consumer reporting agency shall notify all those who received said report within a two year period preceding the discovery. The corresponding Federal Act provision requires such notification only at the request of the consumer. 15 U.S.C. § 168li (d).

2—Section 1315(1) (A) in the original and amended Maine Act, which places limitations on the disclosure of medical information. The Federal Act specifically excludes medical information from disclosure limitations.

3—Section 1319(2) of the Maine Act, which mandates that all investigative consumer reports be written whereas the Federal Act allows reports to be oral. 15 U.S.C. §§ 1681a(d), (e).

4—The omission of the Maine Act to confer the qualified immunity that the Federal Act affords to consumer reporting agencies, users, or sources of information against liability in actions in the nature of defamation, invasion of privacy, and negligence in the reporting of information. 15 U.S.C. § 1681h(e).

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[22] 10 M.R.S.A. § 1323(2) (Supp. 1979-80) provides:

> "Such amount of additional damages as the court may allow, but not less than $100 for each violation of this chapter involving negligence, and for each consumer report containing any item of information that was inaccurate or that the consumer reporting agency had reason to believe was not relevant to the purpose for which it was sought and that contributed in whole or in part to the decision to take adverse action against the consumer."

5—The Maine Act fails expressly to authorize limited disclosure of information to a governmental agency whereas the Federal Act contains such an express authorization. 15 U.S.C. § 1681f.

Plaintiffs maintain that under the Supremacy clause of Article VI of the Constitution of the United States, the aforementioned Maine Act provisions must yield to those of the Federal Act.

The Federal Act provides in Section 1681t that it

> "does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency."

Section 1681t thus manifests the Congressional intendment as to the scope of regulation left open to the states. The key inquiry relates to the meaning of "inconsistent."

The defendant Attorney General says that in view of the legislative history of Section 1681t, "inconsistent" should be held to mean "less protective of consumers." He argues on this basis that any state regulation affording consumers a **greater** protection than is given by the Federal Act cannot be "inconsistent" regulation, no matter what may be the impact upon consumer reporting agencies of such enhanced protection to consumers.

Congressional legislative history lends a degree of support to this contention. For example, Congresswoman Leonor Sullivan, who sponsored the House version of the Federal Act, HR 16340, and chaired the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, suggested a concept of "inconsistency" as follows:

> "State laws which are inconsistent with the Federal law would be pre-empted only to the extent of inconsistency. No state law, however, would be pre-empted unless compliance with that law would entail a violation of the Federal law. **In short, state laws requiring**

> **additional duties should not be affected by the passage of this law.**" 166 Cong. Rec. 36573 (1970) (emphasis added)

Despite this suggestion as to Congressional intendment, we must reject the Attorney General's contention. We regard as too simplistic the criterion he proposes. It would make one, albeit an important, objective of 1681t of the Federal Act—the protection of consumers—the absolutely controlling objective, denigrating all of the other objectives implicit not only in the express statement of findings in Section 1681(a) but also in other provisions of the Federal Act.

Indeed, the textual concept of "inconsistency" in Section 1681t tends to suggest that it embodies the decisional law on the general subject of federal preemption by virtue of the supremacy clause. The case law delineation of the "inconsistency" giving rise to federal preemption is that the state law frustrates, or stands as an obstacle to, the accomplishment of the "**full** purposes and objectives of the Congress." *Hines v. Davidowitz*, 312, U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941) (emphasis added). *See Jones v. Rath Packing Company*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). Furthermore, the entirety of the "inconsistency" phrasing in Section 1681t, "to the extent that those laws are inconsistent with **any** provision of this subchapter, **and then only to the extent of the inconsistency**" (emphasis added), discloses that Congress expected that state regulation would mesh closely with the Federal Act. Thus, the determination whether state law frustrates any particular provision of the Federal Act necessitates a comparison of specific requirements not only in terms of their particular content vis-a-vis each other but also in relation to the inquiry whether the "**full** purposes and objectives" of Congress are being thwarted. Since the sum total of purposes and objectives of the Federal Act cannot be reduced to the simple formula of "absolute protection for the consumer", we cannot say that a state retains unbridled authority to expand consumer protections while frustrating other objectives of the Federal Act. *See Retail Credit Co. v. Dade County, Florida*, 393 F.Supp. 577 (S.D.Fla. 1975).

III-B-1. Notification of Corrected Information.

Plaintiffs contend that the requirement in the original Maine Act that upon discovering an error in a report, a consumer reporting agency shall notify all persons who received that report within the previous two years, must fall in the face of the corresponding provision in the Federal Act, Section 1681c(d), which omits any such mandate for notification when there is no consumer request. Federal Section 1681c(d), however, does provide for an optional updating and correction of reports.

We are unpersuaded that the differences involved in a **mandate** of notification and an **option** of correction generates a conflict between the underlying purposes of the two Acts so serious as to render the difference in regulation constitutionally intolerable. *See Credit Data of Arizona, Inc. v. State of Arizona,* 602 F.2d 195 (9th Cir. 1979).

III-B-2. The Requirement of Written Reports.

Plaintiffs contend that the Maine Act's mandate that investigative consumer reports be in writing cannot stand because the Federal Act permits such reports to be oral. Plaintiffs argue that the Federal Act reveals a federal concern that consumer reporting proceed rapidly and efficiently, and this federal interest tends to be impaired by an insistence on communication in writing.

The argument lacks cogency. The requirement of writing in Section 1319(2) of the Maine Act advances a purpose of both the Federal and Maine Acts, to assure the accuracy of reported information by the particular means of affording consumers access to the information. The stricter Maine requirement that the information be in writing results in a documentation and permanent recordation of the information communicated in a particular transaction. It thus makes it more accessible to consumers and reduces the likelihood that particular information may be omitted from reports communicated in the future. Balanced against these benefits, any delay caused in the communication of information by the necessity of putting it in writing must be taken to be an incidental divergence of regulation insufficient to bring federal preemption into play. *See Credit Data of Arizona v. State of Arizona, supra.*

III-B-3. Disclosure of "Medical Information"

Section 1315(1) (A)[23] of the Maine Act authorizes, with limitations, the disclosure to consumers of "medical information", defined in 10 M.R.S.A. § 1312(8) as

> "information or records obtained, directly or indirectly and with the consent of the individual to whom it relates, from a licensed physician, medical practitioner, hospital, clinic or other medical or medically related facility."

The Federal Act defines "medical information" similarly but excludes it from mandated disclosure as follows:

> "Every consumer reporting agency shall. . . disclose to the consumer:
>
> > "(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request." 15 U.S.C. § 1681g(a) (1) 1974).

In *Retail Credit Co. v. Dade County, Florida, supra,* the preemption issue was raised by a challenge to the constitutionality of a provision in a Dade County Ordinance like that in Section 1315(1) (A). From examination of the Congressional legislative history the court learned that Congress had several times considered and rejected a provision basically similar to the one before it, [24]and it therefore concluded that Congress has plainly manifested intendment to refuse disclosure of medical information to consumers.

Despite the Federal Act's unqualified exclusion from disclosure of medical information, we think that the particular danger Congress sought to avoid thereby is sufficiently averted by the

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[23]Amended Section 1315(1) (A) is somewhat different in substance from its original version which authorized disclosure directly to the consumer "upon written authorization from the consumer's attending physician." Amended Section 1315(1) (A) permits disclosure to a licensed physician whom the consumer could then consult.

[24]The various proposals rejected by Congress are summarized in *Retail Credit Co. v. Dade County, supra,* at 583, n. 10.

procedures set up in Section 1315(1) (A) to avoid nullification of them by federal preemption. The principal purpose of the federal unqualified exclusion, by definition applicable only to formal medical records, was revealed in the Committee Report to the House Amendment adding to Section 1681a(e) of the Federal Act the definition of the term "medical information." The Report said that

> "[t]he rationale was that raw medical information should only be tendered with the counsel of a physician or other medically trained personnel." H.R. Report No. 91-975, 91st Cong., 2nd Sess., **reprinted in** [1970] U.S. Code. Cong. & Ad. News 4394, at 4414.

Section 1315(1) (A) of the Maine Act is in harmony with this rationale, since it authorizes disclosure of medical information only to a licensed physician who may be expected to exercise professional judgment regarding further disclosure to the consumer. Thus, the Maine Act does not expose the consumer to "raw" medical information.

We are aware that Section 1315(1) (A) may not tend to serve a secondary purpose underlying the Federal Act's exclusion of medical information from disclosure: avoidance of an undermining of the traditional doctor-patient relationship that could arise because the physician to whom the information is disclosed might not be the same physician who had treated the consumer. 116 Cong. Rec. 17634 (October 9, 1970). *See Retail Credit Co. v. Dade County, Florida, supra,* at 582. We deem this too minor a divergence, however, to require applicability of preemption. We say this particularly since the physician who treated the patient will probably have kept medical records and will be able to advise the physician who receives the disclosed information; or else such records will likely be under the control of a medical facility where another physician may have access to them with the consumer's consent.

Accordingly, we sustain Section 1315(1) (A) of the Maine Act as not "inconsistent" with the purposes and objectives of the Federal Act.

III-B-4. Qualified Immunity.

Section 1681h(e) of the Federal Act states:

> "no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, except as to false information furnished with malice of willful intent to injure such consumer."

The three sections specifically referred to have the following scope. Section 1681g outlines the substantive content of the disclosure to be made to consumers; Section 1681h generally delineates the procedures by which the information is to be disclosed; and Section 1681m imposes disclosure requirements on users in particular circumstances.

The disclosure provisions of the Maine Act are generally patterned after those of the Federal Act, the objective of each Act being to have full disclosure to the consumer of all information required to be disclosed. However, the Maine Act goes beyond the Federal Act in the procedures established for disclosure. Whereas the Federal Act merely requires that consumer reporting agencies disclose the "nature and substance of all information", [25] 15 U.S.C. § 1681g(a) (1), the Maine Act goes further in prescribing means to ensure full disclosure, by requiring: (1) that a consumer reporting agency disclose "all information [except medical information which is subject to special disclosure rules] in its files on the consumer at the time of the request", 10 M.R.S.A. § 1315(1) (A); (2) that a consumer "be permitted a personal visual inspection of his file", 10 M.R.S.A. § 1316(2) (A); (3) that upon request, the consumer "shall be furnished copies of any investigative consumer reports," 10 M.R.S.A. § 1316(2) (A); and (4) that a consumer may receive "a copy of [his] file" through the mail, after a written request with proper identification. Section 1316(2) (C).

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[25]Congress expressly rejected the notion that consumers should be allowed direct access to their files. *See* H.R. Report No. 91-975, 91st Cong., 2nd Sess., **reprinted in** [1970] U.S. Code Cong. & Ad. News. 4394, at 4415.

The other difference in this regard between the Maine and Federal Acts is that the Maine Act fails to confer the qualified immunity given by the Federal Act as to "any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information." The Maine legislature had considered amending the Maine Act to incorporate such a provision, but such an amendment was not enacted. *See* Legislative Record, 108th Legislature, 616-617 (March 16, 1978).

We decide that, consistently with the supremacy clause of the federal Constitution, the Maine Act's withholding of the qualified immunity conferred by the Federal Act may stand. We so conclude because the Maine Act resorts to an adequate alternative methodology of achieving the basic objective the Federal Act seeks to accomplish through the mechanism of qualified immunity, and thus it is in harmony with the Federal Act.

We therefore distinguish, at once, *Retail Credit Co. v. Dade County, supra,* on the ground that its holding rested on a virtual identity between the disclosure provisions of the Dade County Ordinance and those of the Federal Act, except that the Dade County Ordinance omitted the provision for qualified immunity. By contrast, although tending to follow the pattern of the Federal Act, the provisions of the Maine Act establish **requirements** of disclosure to consumers not found in the Federal Act but which serve the dominant purpose furthered by the Federal Act's grant of qualified immunity.

That purpose, which the Federal Act shares in common with the Maine Act, is to assure the full disclosure to consumers of all information about them that is being communicated through consumer agency reports, thereby to allow consumers not only to be aware of, but also to participate in the process of reviewing, refining, and correcting for accuracy the body of information that is so likely to underly important economic decisions affecting them.

The legislative history of the Federal Act reveals that Congress regarded qualified immunity as the "quid pro quo for full disclosure." 115 Cong. Rec. 13908 (November 6, 1969). To encourage agencies or users voluntarily to make the fullest possi-

ble disclosure to consumers of information on file, including all the adverse information, Congress concluded that they should be given a qualified immunity from liability in actions that may be brought against them for defamation, invasion of privacy or negligence in the reporting or use of information.

The Maine Act substitutes for this federal approach geared to stimulating **voluntary** disclosure an approach relying on **compulsion.** The Maine Act goes beyond the Federal Act's directive that the consumer be given a summary of the nature and substance of the information and requires that consumers shall have complete and direct access to the **files** and shall receive **copies** of the investigative consumer reports (although sources of information may be withheld, *see* Section 1315(1) (B). We conclude that this alternative technique utilized by the Maine Act to achieve fullness of disclosure to consumers sufficiently serves, without thwarting in any material respect, the foundational purpose of the Federal Act's grant of qualified immunity.[26]

[26]The Congressional legislative history suggests that the Federal Act's conferring of qualified immunity on "any person who furnishes information to a consumer reporting agency" serves the ancillary purpose of avoiding drying up of sources of information. The Maine Act's regulatory scheme does not tend to serve this purpose. However, when we concentrate on the kinds of suits likely to be brought against persons who are sources of information to consumer reporting agencies, we discern that of the three mentioned in the Federal Act only two, defamation and invasion of privacy suits, have relevance.

In a defamation action the source of information would not be subject to liability in any event unless the information given was false. That, in this regard, the Maine Act has thus chosen to give a higher priority to assuring a flow of information that is **true** rather than to assure the fullness of a flow of information **regardless** of truth or falsity does not cause it to be inconsistent with the basic purposes of the Federal Act. More particularly is this so since commercial speech that is **false** enjoys no constitutional protection and, hence, an objective to assist the flow of information that may be false is hardly an objective of importance.

As to suits for invasion of privacy, the conduct by which persons, as sources, provide information to consumer agencies will generally be such that they are likely to be exposed to liability in suits for invasion of privacy only as they are alleged to have participated in (1) publicizing the secrets, or certain intimate facts about the persons, of others, or (2) depicting persons to the public in a false light. Such conduct may reasonably be expected to occur rather infrequently in the consumer reporting context. Hence, the need to protect it by

For this reason, then, the entirety of disclosure regulation by the Maine Act, an incidental aspect of which is the omission to confer qualified immunity, is not "inconsistent" with the Federal Act.

III-B-5. Limited Disclosure to Governmental Agencies.

The Federal Act provides that

> "a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency." 15 U.S.C. § 1681f (1974).

Plaintiffs contend that this provision for limited disclosure to governmental agencies must override by preemption what plaintiffs take to be a denial of it in the Maine Act—a denial shown, they say, by the omission of the Act to provide expressly for such limited disclosure combined with restrictions upon disclosure delineated in Section 1313.

Facially, the language of the Federal and Maine Acts does not present so direct a conflict, if conflict at all, as plaintiffs claim. The Federal Act states only an authorization, not a mandate, for limited disclosure to governmental agencies, and the Maine Act does not plainly prohibit such limited disclosure. Despite the expressly stated restrictions of Section 1313, under Section (3) (D) or (E) thereof[27] disclosure to governmental agencies would be permissible in most cases likely to arise.

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conferring qualified immunity, in order to encourage a flow of information useful to consumer reporting agencies, is too marginal to yield a mandate, by preemption, that the Maine scheme of regulation embody the federal grant of qualified immunity.

[27]These pertinent provisions of Section 1313 are:

"A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

". . . .

"3. . . . To a person who it has reason to believe:

For the same policy reasons, then, that led us to decide against nullifying in this proceeding the restrictions imposed by Section 1313 as **facially** violating the constitutional protection of commercial speech, ante at pp. 46, 47, we decide against plaintiffs the issue of federal preemption relative to the disclosure of information to governmental agencies. We so decide because the issue is raised here on the basis of the **facial** provisions of the Maine and Federal Acts, rather than in an "as applied" context calling upon us to adjudicate in an actual set of circumstances whether the Maine Act prohibits a **particular** disclosure of information to a governmental agency which the Federal Act authorizes.

The entry shall be:

1—Appeal of defendant and cross appeal of plaintiffs denied.

2—The judgment of the Superior Court is modified as follows:

(a) As to the first sentence thereof:

(1) by striking therefrom "ss 1321 and ss 1314" and inserting in their place:

"Section 1314(1), Section 1321(1), those particular provisions in Section 1321(2) and (3) prohibiting the inclusion in a consumer agency report, or the retention in a consumer agency's file, of 'irrelevant' information or of information the agency 'has reason to believe is not relevant to the purpose

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". . .

"D. Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

"E. Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

for which it is sought', and Section 1321(4) (A)"; and

(2) by inserting after the words "amended version" and before the words "of the Maine Fair Credit Reporting Act" the phrase, to be set off by commas: "as well as Section 1323(2)."

Thus modified, said first sentence of the judgment is made to read in its entirety:

"The court finds for the plaintiffs on the grounds that Section 1314(1), Section 1321(1), those particular provisions in Section 1321(2) and (3) prohibiting the inclusion in a consumer agency report, or the retention in a consumer agency's file, of 'irrelevant' information or of information the agency 'has reason to believe is not relevant to the purpose for which it is sought', and Section 1321(4) (A) of both the original and amended version, as well as Section 1323(2), of the Maine Fair Credit Reporting Act, 10 M.R.S.A. ss 1311 et seq. are void and unconsitutional for violation of the First Amendment."

(b) By striking from the judgment the sentence reading:

"Notwithstanding the Court's decision for the Plaintiffs on their First Amendment challenges, the Court also finds that the following terms are void for vagueness pursuant to the Due Process Clause of the Fourteenth Amendment: 'personal life style', 'philosophy' and 'uncorroborated hearsay' as found in ss 1321(1) of the original act; 'political beliefs' found in ss 1321(1) of the amended act; and in all instances where the term 'relevant',

its negative or 'obsolete' are found in the original and amended versions of the act, including ss 1321(2) and (3) and ss 1323(2) of the amended act."

(c) By striking from the judgment the full sentence which commences with the words:

"The Court finds for the Defendant . . ." and by substituting in place thereof a full sentence reading:

"The Court finds for the Defendant on Count 5 of Plaintiffs' Amended Complaint which alleged violations of the supremacy clause of Article VI of the Constitution of the United States."

3—The judgment of the Superior Court, as thus modified, is affirmed.

4—Case remanded to the Superior Court for entry of the modified judgment herein affirmed.

5—No costs on appeal.

All concurring.

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APPENDIX B

STATE OF MAINE KENNEBEC, SS	SUPERIOR COURT CIVIL ACTION Docket No. CV77-663	
EQUIFAX SERVICES, INC. and FRANK W. ROBINSON and PAUL D. WEEKS, Plaintiffs v. JOSEPH E. BRENNAN, Attorney General, Defendant	)	DECISION AND ORDER

This is a proceeding for a Declaratory Judgment and Injunctive Relief regarding the constitutionality of the Maine Fair Credit Reporting Act, 10 M.R.S.A. § 1311 *et seq.*

This case was tried on November 6, 1978. In addition to the testimony and exhibits presented on that day, the parties also agreed to make relevant parts of the transcript of the hearing on the issuance of a preliminary injunction held on November 7, 1977, part of the record of this case. The Court has reviewed in detail these transcripts, the depositions and exhibits of all parties to the extent that they are relevant and material, and has read thoroughly the briefs submitted by both parties.

Based upon the evidence presented and for the reasons set forth herein, the Court finds certain provisions of 10 M.R.S.A. § 1311 *et seq.* to be unconstitutional and therefore void. A permanent injunction is hereby immediately issued against Defendant, and all of his agents and subordinates staying any pending or future enforcement of those provisions of the law hereinafter ruled unconstitutional.

Plaintiffs are in the business of supplying information to customers, and their industry has generally been regulated under Federal law since 1971 with the enactment of the Federal Fair Credit Reporting Act. 15 U.S.C.A. § 1681 *et seq.* The State of Maine initially enacted its own law in subsequently the same form (10 M.R.S.A. § 1311 *et seq.*) in 1977; however, Plaintiffs raised objections to the provisions of the Maine law which differ from the Federal Act and began this action. Following the filing of this lawsuit, the Legislature amended the law, eliminating or altering many of the provisions to which Plaintiffs had objected. Plaintiffs' Complaint was subsequently amended to encompass both the original and amended law, and the Defendant moved to dismiss the challenge to the original law due to mootness. This Court denied the motion, on the grounds that there still remained a case and controversy on the issues regarding the original law's constitutionality. This decision therefore applies to both versions of the law.

The Court is, of course, reluctant to strike down any duly enacted law of our State. The Legislature is presumed to act in a constitutional manner and this Court has given as much weight as it can to that fact. *Opinion of the Justices,* 147 Me. 25 (1951). However, this Court is also specifically endowed with the power and duty of judicial review. *Maine Pharmaceutical Association v. Board of Commissioners,* 245 A.2d 271-272 (Me. 1968). While the Superior Court Judge should normally not find an act unconstitutional, exceptional circumstances warrant that the Court act to protect the rights of citizens against unconstitutional laws. *Opinions of the Justices* at 31. This is such an exceptional circumstance.

The Plaintiffs' complaint alleges that the Maine Fair Credit Reporting Act is unconstitutional, and based this attack on six separate grounds which will be addressed in turn.

I. VIOLATION OF THE FIRST AMENDMENT

The Plaintiff contends that the statute, both the original and as amended, infringes upon its constitutional right to freedom of speech as the statute prohibits absolutely the collection, reporting and use of certain information by the consumer reporting agency or user. More particularly, § 1321 of the original Maine Fair Credit Reporting Act prohibited absolutely the reporting and use of certain information about a consumer including information relative to arrest or criminal charge where there is no criminal conviction, uncorroborated hearsay, race, religion, color, ancestry, ethnic origin, personal life style, philosophy, political affiliation, irrelevant or obsolete information. The amended Act in § 1321 additionally prohibits information "relative to a consumer's...sexual preference or orientation, and political beliefs." Finally, § 1321(4) of both the old and new statute further prohibits the reporting of information "regarding drug or alcohol addiction." In addition, the provisions of 10 M.R.S.A. § 1314 of the old and new law require a "written authorization" from the consumer before the procurement or preparation of an investigative consumer report.

A. Consumer Credit Reports Constitute Commercial Speech

The Court finds that consumer credit reports fall within the definition of "commercial speech" and as such are entitled to a limited measure of First Amendment protections.

Prior to 1976, although consumer credit reports had been found to be "commercial speech," commercial speech was deemed unprotected under the First Amendment. *Millstone v. O'Hanlon*, 538 F.2d (8th Cir. 1976). Since the decision of the United States Supreme Court in *Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc.* 425 U.S. 748 96 S.Ct. 1817 48 L.Ed. 346 (1976), however, commercial speech has been entitled to First Amendment protections.

Although the parameters of "commercial speech" have yet to be established definitively, it must be acknowledged that consumer credit reports fall within the definition of commercial

speech. [1] Although the Court in *Virginia Pharmacy* considered commercial speech primarily in terms of advertising, the holding in that case is not so narrow as to encompass only that form of commercial speech. This conclusion is buttressed by *Millstone v. O'Hanlon Reports, Inc.*, where the Eighth Circuit held that since consumer credit reports "were distributed for commercial purposes and clearly without regard to social concerns or grievances," they constituted commercial speech. *Id.* at 832. The fact that *Millstone*, which was decided prior to *Virginia Pharmacy*, refused to grant First Amendment protections to commercial speech does not alter the court's rationale for determining that commercial speech does encompass consumer reports. Further, the only case decided since *Virginia Pharmacy* which has dealt with consumer reports held them to be entitled to commercial speech protections. *See: Anonymous v. Dunn & Bradstreet*, 3 Med. L. Reptr. 2376 (N.D. Ill. 1976).

B. Standard of Review

Although consumer credit reports come within the ambit of First Amendment protections, the Supreme Court has directed that commercial speech should receive only

> a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression. *Ohralik v. Ohio State Bar Assn.* 98 S.Ct. 1912, 1918 (1978).

The Court in *Ohralik* cited several examples where the exchange of certain information was in fact lawfully regulated, including information regarding securities, corporate proxy statements and the exchange of price and production information among competitors. As the Court stated:

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[1] *Compare: Breard v. Alexandria*, 71 S.Ct. 920 (1951) where the Supreme Court reasoned that the selling of magazine subscriptions "bring into the transaction a commercial feature" *with Martin v. Struther*, 62 S.Ct. 863 (1943) where the Court held that the distribution of leaflets publishing a religious meeting involved "no element of the commercial." Here, the primary function of the Plaintiffs' business is the limited distribution of consumer credit reports, for a fee.

> Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation. *Id.* at 1919 [citations omitted].

Thus, upon concluding that consumer credit reports constitute "commercial speech" the Court must apply the appropriate standard in reviewing the legality of the state statute. The Supreme Court has specifically indicated that to determine whether state regulation is permissible, First Amendment rights are to be "balanced" against other governmental interests. *Bigelow v. Virginia,* 421 U.S. 809, 826 (1975). In *Virginia Pharmacy,* the Court noted that the state's interest in sustaining advertising bans challenged under the First Amendment must withstand a "closer inspection" than challenges based on due process and equal protection grounds. *Compare: Virginia Pharmacy* 96 S.Ct. 1917, 1829 *with Williamson v. Lee Optical Co.* 348 U.S. 483, 755 Ct. 416, 99 L.Ed. 563 (1955) *and Head v. New Mexico Board* 374 U.S. 424, 835 Ct. 1759, 10 L.Ed.2d 983 (1963). Yet the Court has explicitly concluded that there is no parity of constitutional protection for commercial and non-commercial speech, *Ohralik* 98 S.Ct. at 1918 (1978), and thus, strict scrutiny is not required to determine whether sufficient justification for the regulation exists.

Accordingly, the Court must adopt a modified strict scrutiny test to review the validity of the legislation. The conclusion is buttressed by the decision in *Linmark Associates, Inc. v. Township of Willingboro,* 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) where the Court held that the existence of a "strong state interest" alone was an insufficient basis for restricting the free flow of truthful information, and that it must also be shown that the statute was **necessary** to achieve the objective urged by the State. *Id.* 52 L.Ed.2d at 163. *See also: San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 51, 93 S.Ct. 1278, 1306 (1973).

In conjunction with establishing the standard of review, it is the Plaintiff's contention that the Defendant must make an

actual showing of the existence of a specific "evil" which would justify the Legislative action. The Plaintiffs cite *Linmark Associates* for the proposition that "commercial speech" cannot be banned because of an unsubstantiated belief that its impact is "detrimental." *Linmark Associates* at 161 n.6. The Plaintiffs' reliance on *Linmark Associates* is misplaced, however, when compared with *Ohralik v. Ohio State Bar Ass'n.* As in the instant case, *Ohralik* dealt with prophylactic measures, specifically Disciplinary Rules 2-103(a) and 2-104(a) of the American Bar Association Code of Professional Responsibility, which prohibited the in-person solicitation of clients for pecuniary gain. There the court held that since the objective of prophylactic measures is the prevention of harm before it occurs, it was not necessary to show actual proven harm to the solicited individual. Rather, the rules could be applied where the lawyer solicited clients under circumstances **likely to result** in the adverse consequences the State seeks to avert.

As the Court stated:

> In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.
>
> . . . .
>
> The efficacy of the State's effort to prevent such harm to prospective clients would be substantially diminished if, having proved a solicitation in circumstances like those of this case, the State were required in addition to prove actual injury. *Ohralik* at 1923.

C. Application of the Standard of Review

Under the rationale of the Court in *Ohralik*, it is apparent that consumer credit reports may be lawfully regulated if the State is capable of proving that consumer credit reports "more often than not" prove injurious to consumers, as well as establishing a strong state interest for the legislation. This interpretation is supported by decisions of the Law Court which have held that due to the presumed constitutionality of all statutes, the

State need not prove the existence of the evil sought to be prevented:

> It is not necessary for the State to demonstrate to us that the actual evils persist . . . . The courts must restrict their inquiry to the issue of whether any state of facts either known or which reasonably could be assumed affords support for the legislative judgment. *State v. Rush*, 324 A.2d 748, 753 (Me. 1974).[2]

See also: National Hearing Aid Centers, Inc. v. Smith 376 A.2d 456, 460 (Me. 1977).

It is Defendant's contention that justification for the regulatory statute at hand lies in the State's interest in upholding and strengthening the fundamental right to privacy.

The Court summarily rejects the Defendant's argument that there is a constitutional right to privacy which is applicable here. To the contrary, the United States Supreme Court has made clear that although the constitution affords protection against certain kinds of **government** intrusions into personal and private matters, there is no general constitutional "right to privacy":

> The protection of a person's **general** right to privacy — his right to be let alone by other people-is, like the protection of his property and of his very life, left largely to the law of the individual states. *Katz v. United States*, 389 U.S. 347, 350-351, 88 S.Ct. 507, 510 [footnote omitted].

See also: Paul v. Davis 424 U.S. 693, 712-714, where the Court found that the reporting of truthful, accurate, public record information regarding an arrest was not an invasion of any constitutional right to privacy. *Whalen v. Roe*, 429 U.S. 589, 598 n. 23 and 24. (1977). The Maine Fair Credit Reporting Act cannot be justified on the grounds of the constitutional right of privacy, where it is charged that private companies, rather than govern-

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[2]Although *State v. Rush* did not concern the constitutionality of a statute which regulated a fundamental right, and therefore only a test of rationality was applied, there is no reason to believe that the Court should apply a different rule where a standard of modified strict scrutiny is employed.

mental agencies, are the potential intruders. Rather, state law must be consulted to determine whether the "right to privacy" prohibits the dissemination of consumer credit reports to certain insurance and credit agencies.

The Law Court recently recognized the existence of a right of privacy enforceable against private persons or corporations in *Estate of Berthiaume v. Pratt, M.D.*, 305 A.2d 792 (Me. 1976). As delineated in *Nelson v. Times*, 373 A.2d 1221 (Me. 1977), and applied in *Tureen v. Equifax, Inc.* 571 F.2d 411, 415 (8th Cir. 1978), the investigation of a consumer by a retail credit company at the request of its client, and disclosure of certain information about the consumer to the client may invade an individual's right to privacy in one of two ways:

1. unreasonable intrusion upon the seclusion of another;
   and
2. unreasonable publicity given to another's private life.

In *Tureen* the court determined that certain objectionable snooping techniques used by consumer reporting companies could be considered an intrusion violative of the right to privacy. However, the court held that where the defendant-consumer reporting agency merely collected and retained information concerning the plaintiff's past insurance history, which was information relevant to a legitimate business purpose, no unreasonable intrusion of privacy occurred. The court reasoned as follows:

> In today's mobile society, there is a legitimate business need for consumer reports which serve such important public functions as minimizing the risks of extending valuable benefits and credit and assisting in detection of fraudulent credit applications and insurance claims. In order to make informed judgments in these matters, it may be necessary for the decision maker to have information which normally would be considered private, provided the information is legitimately related to a legitimate purpose for the decision maker. In such a case, the public interest provides the

> [consumer reporting service] a shield which is similar in principle to a qualified privilege in libel. *Id.*

Applying the rationale of *Tureen* to this case, the Court determines that the challenged portions of the statute are not suitably limited to regulate the method in which certain information is obtained. Rather, the statute indiscriminantly regulates the content itself of the reports. The State cannot legitimately argue that such regulations are directed towards prohibiting intrusion into a consumer's privacy, for there is no distinction made in the statute regarding the source from which the credit reporting agency receives its information. Thus, it cannot be said that the Plaintiffs would be intruding into a consumer's privacy where they collect and disseminate public record information, as it has been held that privacy interests fade when information is made a part of the public record. *Cox Broadcasting v. Cohen,* 420 U.S. 269. 296 (1975).

Since the statute is so broad as to prohibit disseminating information which is obtained from public records, as well as information that might be obtained only by means of intruding into a consumer's privacy, the State may not justify the regulation on the grounds that its purpose is to prevent intrusion. Assuming that was the State's intent, the Legislature failed to exercise the care and precision which restrictions on speech require. *National Commission on Egg Nutrition v. F.T.C.,* 570 F.2d 157, 164 (7th Cir. 1977).[3]

Nor does the Court find that the right to be free from unreasonable publicity of an individual's private life justifies the type of regulation imposed upon Plaintiffs' speech. A cause of action for this tort arises only where the matter publicized is a kind that

> (a) would be highly offensive to a reasonable person; and

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[3]It should be further noted that in *Nelson v. Times* the Law Court stated that a complaint alleging intrusion upon the seclusion of another should minimally allege a physical intrusion upon premises occupied privately by a plaintiff for purposes of seclusion. *Id.* at 1223. However, the MFCRA does not prohibit such conduct, but chose rather to prohibit the dissemination of broad categories of information.

(b) is not of legitimate concern to the public.

Nelson v. Times at 1225 *quoting* Restatement of Torts (Second) § 652D.

Again, the Court must note that while these two requirements may be met for certain aspects of private information which the Plaintiffs might seek to disclose, such restrictions are not applicable to public record information. Where the statute fails to distinguish between private and public record information, the State may not rely upon this ground as its "strong state interest." In *Nelson v. Times,* where an infant plaintiff brought an action against a newspaper to recover for alleged invasion of privacy arising from unauthorized publication of his picture, the court found:

> The publication disclosed nothing about the private life of this infant plaintiff that was unknown to anyone who might see him. A person's facial appearance is exposed to the public eye. *Id.*

Thus, the State cannot assert that the statute prevents unreasonable publicity given to another's private life where the categories of prohibited information include "race" and "color" which are, like the photograph in *Nelson*, exposed to the public eye and therefore, not "private".

Further, pursuant to the Restatement, the Court in *Tureen v. Equifax* concluded that in order for the plaintiff to make a submissible case of invasion of privacy by a public disclosure, there must be evidence of publicity in the sense of a disclosure to the general public, as opposed to the "publication" required in a defamation action. *Id.* at 419. The Federal Fair Credit Reporting Law, 15 U.S.C.A., § 1681q, § 1681r, prevents dissemination of credit reports to those who do not have a legitimate interest in receiving them. By strictly limiting the recipients of the reports, the requisite "publicity" is absent.

Considering the Maine Fair Credit Reporting Act as a prophylactic measure, and applying the standard established in *Ohralik*, the State has failed to demonstrate that "more often than not" investigative reports would invade the privacy of consumers either through intrusion or disclosure. Thus, the Defendant

has failed to demonstrate that any strong state interest allegedly served by the MFCRA exists. Balancing the First Amendment rights of the Plaintiffs against the failure of the Defendant to advance a legitimate "strong state interest," as directed by *Bigelow v. Virginia,* the Court concludes that the First Amendment challenge of the Plaintiffs must stand.

The Court does not decide here, however, that no strong state interest could have been advanced, but rather premises its conclusion on the failure of the Legislature to exclude public record information from the statutory restrictions of the Maine Fair Credit Reporting Act. That public record information should have been excluded from the MFCRA is clear. *McNally v. Pulitzer Publ. Co.,* 532 F.2d 69, 79 (8th Cir. 1976); *Cox Broadcasting Corp. v. Cohen,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). In *Cox Broadcasting Corp. v. Cohen*, the Supreme Court decided that the First and Fourteenth Amendments prohibited the State of Georgia from imposing sanctions on the publication of truthful information contained in official court records open to the public. There, the statute in question made it a misdemeanor to publish or broadcast the name or identity of a rape victim, yet the rationale of the court is equally instructive here.

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. *Id.* 95 S.Ct. at 1046.

Similarly, the Plaintiffs' rights in the realm of commercial speech here deserve protection where the evidence presented indicated that specific portions of consumer credit reports are accurately derived from public record information. Insofar as Plaintiffs merely collect various facts from public record sources, their rights are equal to any individual who is permitted to inspect and disseminate public record information without fear of liability. (*McNally* at 79).

The Maine Fair Credit Reporting Act, as presently drafted,

fails to limit its regulation of commercial speech in a manner which would promote the alleged state interest, and it has been repeatedly held that the First Amendment does not permit a remedy broader than that which is necessary to prevent the alleged evil. *Beneficial Corp. v. F.T.C.*, 542 F.2d 611, 619-620 (3rd Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *National Commission on Egg Nutrition v. F.T.C.*, 570 F.2d 157, 164 (7th Cir. 1977); *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749, 758 (D.C. Cir. 1977).

Accordingly, where 10 M.R.S.A., § 1314 prohibits the reporting of certain information in consumer reports without first obtaining the consent of the person who is the subject of that report, and where § 1321 prohibits the reporting of certain broad categories of information in any circumstances, even with the consent of the consumer involved, the free flow of accurate public record information has been unlawfully restricted. This Court finds that both 1314 and 1321 of the original and amended acts are void and unconstitutional as violative of the First Amendment.

II. VOID FOR VAGUENESS

The Plaintiffs contend that the Maine Fair Credit Reporting Act violates the Due Process clause of the Fourteenth Amendment in that certain terms are unconstitutionally vague.

The Court rejects Defendant's contention that the void for vagueness doctrine carries less weight where civil sanctions alone are involved. The Law Court has held that whether an individual is faced with a criminal prosecution or a civil action, "he is entitled to be informed by the statute in explicit and unambiguous language what acts and conduct are prohibited." *Dowel Prod. Co. v. Forster Mfg. Co.*, 153 Me. 265 (1957) Indeed, the United States Supreme Court has held that where concepts of free speech are concerned "stricter standards of permissible statutory vagueness may be applied." *Hynes v. Mayor of Oradell*, 48 L.Ed.2d 243, 253 (1976)

In Maine, where the meaning of imprecise terms can be derived from earlier judicial interpretations, and common law, or "the normative standards which guide the conduct of the members of . . . a profession" the statute is not vague. *State v. Daven-*

port 326 A.2d 1 (Me. 1974); ["high and aggravated assault"] *Maine Real Estate Commission v. Kelby,* 360 A.2d 528 (Me. 1976) ["bad faith," "incompetency," "untrustworthiness," and "dishonest, improper or fraudulent dealings"].

Although this Court has already determined that § 1321 must be struck down as a violation of the First Amendment, the Court also finds that certain terms within that section do not guide the consumer reporting industry in planning its own future conduct, and accordingly, must be struck down as unconstitutionally vague.

Instructive is *Swed et al. v. Bar Harbor*, 158 Me. 220 (1962) which held that an ordinance regulating "bric-a-brac" stores was void for vagueness. The Court stated:

> . . . [T]o capture comprehensively all the concepts of the illusory term bric-a-brac, is morally impossible. While we could never correctly assert that all things are bric-a-brac, a multitude surely must or could be as to further multitudes there can be no confident judgment . . . Bric-a-brac as a category is too conducive to arbitrary abuse and unlimited cannot be utilized as a norm in a penal law. A person of ordinary intelligence would be habitually nonplused as to whether a store inventory included or was innocent of bric-a-brac. *Id.* at 225.

Applying these standards to certain sections of the Act in question, the Court finds that in certain instances the Maine Legislature failed to regulate with the requisite definitiveness.

Pursuant to the original § 1321, information concerning a consumer's "personal life style" or "philosophy" may not be reported. As with "bric-a-brac" there can be no confident judgment as to what information comments upon an individual's life style, as all information contained in a consumer report at least tangentially concerns the consumer's life style. Further, testimony presented indicates there is no normative standard within the consumer reporting industry as to what is meant by the term "life style"; thus, consumer reporting agencies are left without a guide to determine what can or cannot be included, and that term is found to be patently vague.

A similar conclusion must be reached for the term "philosophy". Although the Defendant argues that the term "philosophy" has the everyday, commonsense definition of "one's outlook on life", those items which fall within the definition of philosophy cannot be easily categorized. As with "bric-a-brac", "philosophy" and "life style" are terms not conducive to a limiting definition where only marginal cases would produce doubts. Rather, they are "essentially prolific of omnipresent cases with doubts, all in the pole of the very definition." *Id.* at 226.

While the Court finds that this analysis is also applicable to the term "political beliefs", Plaintiffs' challenge of "political affiliation" is dismissed, as that term is a sufficient and clear reference to partisan political identification, which withstands the contention that it is unconstitutionally vague.

Nor is the term "sexual preference or orientation" vague, despite Plaintiffs' attempts to confuse the phrase with "marital status." The term "sexual preference" is found only in the amended version of § 1321(1) of the Act, which does permit agencies to report the marital status of consumers. By deduction, the definition of "sexual preference" is limited to one's proclivities toward heterosexual, homosexual or bisexual behavior, and the phrase is not unduly imprecise.

The Plaintiffs also object to § 1321(4) (A) (6) of both the original and amended Acts, which excludes from any consumer report:

> **Information regarding drug or alcoholic addiction** unless such information is provided by a licensed practicing physician and the information relating to such addiction does not antedate the consumer report. . .by more than 7 years;. . . .

The Plaintiffs themselves concede that the word "addiction" is a medical term which differs from person to person. (11/10/77 TR. 112-113). Where the intent of this statute is to limit the instances where inaccurate or misleading information is disseminated to the detriment of the consumer, the Legislature found it appropriate that it require consumer reporting agencies to derive any information regarding a subject's alleged addiction

from a licensed physician, who would be qualified to determine whether or not the individual in question was medically "addicted." Thus, the statute is not vague where it prohibits reporting any information regarding addiction unless it is substantiated by a licensed physician. Applying a commonsense meaning to the phrase in question, *Fournier v. Fournier,* 376 A.2d 100 (Me. 1977), the word "regarding" does not convert the explicit term "addiction" into a nebulous phrase, and the Court hereby finds that the statute adequately guides an individual as to what information, if reported, will result in a violation of the statute.

When reference is made to the intent of the statute, that is, to insure that only accurate information regarding the consumer is distributed, the Court must conclude that the term "uncorroborated hearsay" is fatally indefinite. The original version of § 1321(1) prohibited the use of information based upon "uncorroborated hearsay," yet, no suggestion was given as to whether the legal definition of hearsay, or the definition Defendant advances (i.e. information not obtained from the subject) should be applied. Further, no guidelines suggested whether the corroborating source itself could be hearsay, or whether first-hand knowledge was required. If the former, misleading or inaccurate reports might flourish to the detriment of consumers. Therefore, the Court must apply here the rule that a statutory term is void for vagueness where it

> sets guidelines which would force men of general intelligence to guess at its meaning, leaving them without assurance that their behavior complies with legal requirements and forcing the courts to be uncertain in their interpretation of the law. *Maine Real Estate Commission v. Kelby,* 360 A.2d 528 at 531 (Me. 1976)

The Court declines to set a definition for the term "uncorroborated hearsay" as that is purely a legislative function, and accordingly, finds that the phrase "uncorroborated hearsay" is void for vagueness.

The Court also determines that the terms "relevant" and "obsolete," which are interspersed throughout the act, leave the members of the consumer reporting industry in the position of

having to guess whether their conduct comports with the statute. Through the 1978 amendments, an attempt was made to clarify the term "relevant" by imposing liability only when consumer reporting agencies collect and disseminate information which they have "reason to believe is . . . not relevant to the purpose for which it is sought." § 1321(2). Nonetheless, the Court continues to question whether the term "relevant" can be interpreted in a consistent manner.

Relevancy and obsolescence depend upon the specific facts of a case, as well as on the internal operating policy of a given insurance company or employers. The Plaintiffs, like all consumer reporting agencies, act as simply a conduit of information, and make no determination on particular insurance or employment applications. Only the user of the reports can identify relevant facts. Thus, in the gathering of information, the Plaintiffs are not in the position to ascertain whether certain facts are "relevant," and the statute provides no assistance whatsoever. Surely it is not up to the reporting agencies to determine whether a heart attack suffered by a particular individual ten years ago is still "relevant," rather than "obsolete" information to the user, a health insurance company.

Defendant's reliance on *Fournier v. Fournier,* 376 A.2d 100 (Me. 1977) is misplaced. There, the Law Court held that a statute was not vague where it required the judge to "divide the marital property in such proportions as the court deems just after considering all relevant factors . . . ." While judges are authorized to exercise their discretion in applying that statute, here, agents of the consumer reporting industry are not so empowered, and are entitled to statutory guidelines so that they do not overstep the boundaries of the law. Further, the statute under consideration in *Fournier* provided three factors which the judge must evaluate in each particular case. Here, not one elucidating factor was included to limit the definition of either "relevant" or "obsolete.".

Accordingly, this Court concludes that all sections of the law, both the original, and as amended, which utilize the term "relevant", or its negative, or "obsolete" are vague, as the statute does not provide guidance against which to measure conduct.

Plaintiffs argue that the original version of 10 M.R.S.A. § 1326, which prescribes criminal penalties for knowingly and intentionally providing information from a consumer reporting agency's files to a "person not authorized to receive that information" is unconstitutionally vague as a whole. The Court concludes that even prior to the amendment of § 1326, it was clear that criminal penalties would result only where the information was provided to individuals other than those authorized under § 1313 and § 1314. Authorization necessarily requires that the individual receive the consumer's written authorization for the procurement of an investigative consumer report. As so interpreted, § 1326 of the original act is not unconstitutionally vague.

Finally, Plaintiffs challenge § 1323 of the original act which provided for a fine of "$100 for each item of erroneous information reported which was the result of final action. Although particulate, a reasonable person would conclude that a reporting agency would be fined for each item of erroneous information **resulting in** final action by the user, that is, a determining factor of the user's decision. The phrase is so construed, and will not be struck down on the grounds of vagueness.

III. OTHER CONSTITUTIONAL CHALLENGES

In light of the traditional rule that a Superior Court Justice should hesitate to rule a statute unconstitutional absent exceptional circumstances, *Opinion of the Justices,* 147 Me. 25, 31 (1951), this Court declines to decide the other constitutional challenges raised by the Plaintiffs, where these contentions are based upon significantly weaker grounds than the First Amendment and Due Process claims advanced by the Plaintiffs.

Regarding the Plaintiffs' charge that the equal protection clause has been violated, a high degree of deference to legislative discretion has been displayed by the judiciary when economic issues are involved. *See: State v. National Advertising Company,* 387 A.2d 745 (Me. 1978); *New Orleans v. Dukes,* 427 U.S. 297 (1976). When viewed in this context, a classification which distinguishes between the consumer reporting industry, which is the only industry whose sole purpose is the selling of informa-

tion for profit, and the insurance industry, is not an overwhelming demonstration of invidious discrimination. Accordingly, no "exceptional circumstances" requiring the Superior Court to rule the statute unconstitutional exist, and the Court defers to the Law Court on this issue, as well as the challenge based upon substantive due process grounds.

In addition to the presumption of constitutionality as applied to all statutes, the Court declines to rule on the issue of pre-emption where the Court must ". . . start with the assumption that the historic police powers of the states were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Accordingly, where the evidence presented before this Court was not conclusive, the presumption must prevail that this field, which has been traditionally occupied by the states, *See: Grove v. Dun & Bradstreet, Inc.* 438 F.2d 433 (3rd Cir. 1971), *cert. denied* 404 U.S. 898 (1972), has not been pre-empted by the federal law.

Finally, the Court finds that the Plaintiffs have failed to pursuade the Court that the Maine Act unduly burdens interstate commerce. Although there is some evidence that the Maine Fair Credit Reporting Act does affect interstate commerce, the Plaintiffs did not attempt to quantify such impact economically in terms of time and money. Applying the standard enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) and *South Pacific Co. v. Arizona*, 325 U.S. 761, 767 65 S.Ct. 1515, 1519, 89 L.Ed. 1914 (1945), the fact that state legislation affects interstate commerce is insufficient, alone, to support a finding of unconstitutionality. Rather, the presumption of unconstitutionality must prevail where the evidence is not conclusive that an excessive burden on interstate commerce results from the application of the Maine Fair Credit Reporting Act.

The entry will be: The Court finds for the Plaintiffs on the grounds that § 1321 and § 1314 of both the original and amended version of the Maine Fair Credit Reporting Act, 10 M.R.S.A. § 1311 *et seq.* are void and unconstitutional for violation for of the First Amendment.

Notwithstanding the Court's decision for the Plaintiffs on their First Amendment challenges, the Court also finds that the following terms are void for vagueness pursuant to the Due Process Clause of the Fourteenth Amendment: "personal life style", "philosophy" and "uncorroborated heresay" as found in § 1321(1) of the original act; "political beliefs" found in § 1321(1) of the amended act; and in all instances where the term "relevant", its negative or "obsolete" are found in the original and amended versions of the act, including § 1321(2) and (3) and § 1323(2) of the amended act.

The Court finds for the Defendant on Counts 3, 4, 5 and 6 of Plaintiffs' Amended Complaint, which alleged violations of substantive due process, and of the Commerce, Supremacy and Equal Protection clauses of the United States Constitution.

As indicated above, the Court declares those certain provisions of 10 M.R.S.A. § 1311 *et seq.* as originally enacted and as amended to be unconstitutional for the reasons set forth in this opinion. It is ORDERED, ADJUDGED, and DECREED that a permanent injunction is hereby issued, enjoining and restraining Defendant Attorney General, his agents and employees, or persons acting on behalf of Defendant from enforcing pursuant to 10 M.R.S.A. § 1326 or by criminal indictment, civil action or injunction pursuant to 5 M.R.S.A. § 209, or otherwise, and exempting Plaintiffs from compliance with those sections of the Maine Fair Credit Reporting Act as outlined above which the Court has declared unconstitutional. Neither party shall be entitled to costs.

So ordered.

Dated: March 30, 1979

LEWIS I. NAIMAN
JUSTICE, SUPERIOR COURT

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MARCH 30, 1979
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APPENDIX C

CHAPTER 210

FAIR CREDIT REPORTING ACT

§ 1311. Short title

This chapter may be cited as the "Fair Credit Reporting Act."

1977, c. 514.

§ 1312. Definitions

As used in this chapter, unless the context otherwise indicates, the following words shall have the following meanings.

1. Adverse information. "Adverse information" means information that is likely to have a negative effect upon the ability or eligibility of a consumer to obtain credit, credit insurance, employment or other benefits, goods or services.

1-A. Administrator. "Administrator" means the Superintendent of the Bureau of Consumer Protection.

2. Consumer. "Consumer" means an individual.

3. Consumer report. "Consumer report" means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, credit history and employment status which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal family or household purposes or employment purposes or other purposes authorized under section 1313. This term does not include any report containing information solely as to transactions or experiences between the consumer and the person making the report or any authorization or approval of a specific extension of credit directly or indirectly by the issuance of a credit card or similar device or any report in which a person who has been requested by a 3rd party to make a specific extension of credit, directly or indirectly, to a

consumer conveys his decision with respect to that request, if the 3rd party advises the consumer of the name and address of the person to whom the request was made and that person makes the disclosure to the consumer required under section 1320.

4. Consumer reporting agency. "Consumer reporting agency" means any person who, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports or investigative consumer reports to 3rd parties.

For purposes of this chapter, the phrase "3rd party" shall not include an insurer to the extent consumer credit information or other information on consumers is furnished to the insurer by its own employee or licensed agent.

5. Employment purposes. "Employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

6. File. "File" when used in connection with information on any consumer means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

7. Investigative consumer report. "Investigative consumer report" means a consumer report or portion thereof which includes information bearing on a consumer's character, general reputation, personal characteristics or mode of living which is obtained through personal interviews with neighbors, friends or associates of the consumer or with others with whom he is acquainted or who may have knowledge concerning any such items of information or by other means. Such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

8. Medical information. "Medical information" means information or records obtained, directly or indirectly and with the consent of the individual to whom it relates, from a licensed physician, medical practitioner, hospital, clinic or other medical or medically related facility.

[**9.** *Repealed. 1979, c. 541, § B, 10, eff. June 22, 1979.*]

10. Person. "Person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

11. User. "User" when used in connection with the use of a consumer report means any recipient of a consumer report or an investigative consumer report other than the subject thereof.

1977, c. 514; 1977, c. 677, §§ 1 to 3; 1979, c. 541, § B, 10, eff. June 22, 1979; 1979, c. 636, § 1.

§ 1313. Permissible purposes of consumer reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

1. In response to the order. In response to the order of a court having jurisdiction to issue such an order;

2. In accordance with the written instruction of the consumer. In accordance with the written instructions of the consumer to whom it relates;

3. To certain persons. To a person who it has reason to believe:

A. Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer;

B. Intends to use the information for employment purposes;

C. Intends to use the information in connection with the underwriting of insurance involving the consumer;

D. Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

E. Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

1977, c. 514.

§ 1314. Preparation and procurement of investigative consumer reports

1. Notice to consumer required. A person may not procure or cause to be prepared an investigative consumer report on any consumer unless:

A. That person has provided the consumer with clear and conspicuous written notice of the requested procurement or preparation and the consumer has, in turn, given a signed written authorization for each procurement or preparation; or

B. The report is to be used in connection with an investigation of an employee by that employee's present employer involving an employment purpose for which the employee's present employer involving an employment purpose for which the employee has not specifically applied.

2. Contents of notice. The notice to the consumer, which is required by the preceding subsection shall clearly and conspicuously:

A. Disclose to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics and mode of living, whichever is applicable, may be made;

B. Inform the consumer that he may request and receive from the person who intends to procure such a report, within 5 business days of that person's receipt of his request, the name, address and telephone

number of each consumer reporting agency making an investigative consumer report about him; and

C. Inform the consumer that he may request and promptly receive from all such consumer reporting agencies copies of any such investigative consumer reports.

1977, c. 514; 1977, c. 677, § 4.

§ 1315. Disclosures to consumers

1. Required disclosures. Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to that consumer:

A. All information in its files on the consumer at the time of the request, except that medical information, as defined in section 1312, subsection 8, may be withheld. The consumer shall be informed by the agency of the existence of any such medical information withheld and shall have a right to have that information disclosed to a licensed physician of his choice. Nothing in this chapter shall be construed to prevent, or to authorize any consumer reporting agency to prevent, such a physician from subsequently disclosing that information to the consumer to whom it relates. The agency shall inform the consumer of the consumer's right to disclosure of such withheld information at the time the consumer makes a request to inspect all files pursuant to this section.

B. All items of information in its files on that consumer except that the sources of information need not be disclosed. However, in the event an action is brought under this chapter such sources shall be available to the consumer under appropriate discovery procedures in the court in which the action is brought.

C. The names and addresses of the recipients of any consumer report or investigative consumer report on the consumer which it has furnished:

(1) For employment purposes within the 2-year period preceding the request; and

(2) For any other purpose within the 6-month period preceding the request.

2. Exceptions. The requirements of subsection 1 respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this chapter, except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

3. Agency compliance with request. A consumer reporting agency shall not require a consumer to do anything other than furnish identification in order that the consumer may have access to information required to be disclosed by subsection 1.

1977, c. 514; 1977, c. 677, § 5; 1979, c. 127, § 59, eff. April 23, 1979.

§ 1316. Methods and conditions of disclosure to consumers

1. Conditions. A consumer reporting agency shall make the disclosures required under this section during normal business hours and on reasonable notice.

2. Methods. The disclosure required under section 1315 shall be made to the consumer by one or more of the following methods:

A. In person, if he appears in person and furnishes proper identification, and in any such case, the consumer shall be permitted a personal visual inspection of his file and, upon his request, shall be furnished copies of any investigative consumer reports at a charge for photocopying not to exceed the agency's actual costs for that photocopying;

B. By telephone, if he has made a written request with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer; or

C. By promptly mailing a copy of the consumer's

file to him, if he has made a written request with proper identification, at a charge for photocopying and mailing not to exceed the agency's actual costs for such photocopying and mailing, plus a disclosure fee not to exceed $3. In the event that the request for a copy of the consumer's file is made after an adverse consumer determination, the cost of such disclosure shall be paid by the consumer reporting agency. The agency shall not be held responsible for improper disclosure of a consumer's file resulting from improper delivery by the United States Postal Service when the agency properly mailed the file correctly addressed to the consumer who is the subject of the file.

3. Agency personnel to supply information to consumer. Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him either by personal interview or telephone communication by an explanation of such information if provided in code or trade terminology.

4. Consumer seeking disclosure by personal interview. The consumer who seeks disclosure by means of a personal interview pursuant to subsection 2, paragraph A, shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

1977, c. 514; 1977, c. 677, § 6.

§ 1317. Procedure for correcting inaccurate information

1. Agency procedures for corrections. A consumer reporting agency shall adopt reasonable procedures to enable a consumer to correct any inaccurate information in his file.

2. Reinvestigation by consumer reporting agency. If a consumer disputes any item of information contained in his file on the ground that it is inaccurate and such dispute is directly conveyed to the consumer reporting agency by the consumer, the

consumer reporting agency shall promptly reinvestigate and record the current status of such information, unless it has reasonable grounds to believe that the dispute by the consumer is frivolous, and it shall promptly notify the consumer of the result of its investigation and his rights pursuant to subsections 4, 5 and 6. The presence of contradictory information in a consumer's file shall not, in and of itself, constitute reasonable grounds for believing the dispute is frivolous.

3. Agency to record efforts in consumer file. Upon reinvestigation, the consumer reporting agency shall record in the consumer's file the efforts undertaken to reinvestigate the dispute, including, but not limited to, the names of the person or persons conducting the reinvestigation.

4. Agency action, if error. If, after conducting the reinvestigation prescribed by subsection 2, the consumer reporting agency finds that an item is inaccurate or that it can no longer be verified, it shall:

A. Promptly expunge the item and otherwise correct the file; and

B. Refrain from reporting the item in subsequent consumer reports.

Notwithstanding anything is[1] this section, if a consumer reporting agency is requested to act pursuant to this subsection, it may retain the report that is found to be inaccurate; provided that the report is kept separate from other reports about the consumer, that it is conspicuously marked as containing inaccurate information which shall not be disclosed, and that it shall not be disclosed by the consumer reporting agency except in connection with its defense to a civil action brought pursuant to sections 1322 and 1323.

5. Agency inability to resolve difference. If, after conducting the reinvestigation prescribed by subsection 2, the consumer reporting agency is unable to resolve any difference still remaining between the allegations made by its sources and the consumer, it shall:

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[1]So in original; probably should read "in".

A. Promptly indicate in the file that the item is disputed;

B. Permit the consumer to file a statement containing the nature of the dispute. The agency may limit such statements to not more than 200 words if it provides the consumer with assistance in writing a clear summary of the dispute;

C. Include the consumer's statement of the dispute in all subsequent credit reports containing the information in question; and

D. Clearly note in all subsequent consumer reports that the item is disputed by the consumer.

6. Agency notification of change. When a consumer reporting agency must act pursuant to subsections 4 and 5, it shall notify the consumer in writing that it will notify each person whom the consumer designates who has received the item of information during the previous 2 years for employment purposes or during the previous 6 months for any other purpose that the item is inaccurate, can no longer be verified or that it is disputed and that it will furnish them with the corrected information, and the consumer reporting agency shall notify each person designated by the consumer who has received the item of information during the previous 2 years from employment purposes or during the previous 6 months for any other purpose, that the item is inaccurate, can no longer be verified or that it is disputed, and shall furnish those persons with the corrected information and, where applicable, with a copy of the consumer's statement.

1977, c. 514; 1977, c. 677, § 7; 1979, c. 127, §§ 60, 61, eff. April 23, 1979.

§ 1318. Public record information for employment purposes

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall:

1. Notification to consumer of report. At the time such public record information is reported to the user of such consumer report, notify the consumer of the substance of the public record information that is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

2. Strict procedures. Maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up-to-date. For purposes of this subsection, items of public record relating to convictions, suits, tax liens and outstanding judgments shall be considered up-to-date if the current public record status of the item at the time of the report is reported.

1977, c. 514; 1977, c. 677, § 8.

§ 1319. Restrictions on investigative consumer reports

1. Inclusion of adverse information in subsequent report. Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report, other than information which is a matter of public record, may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report or the adverse information was received within the 3-month period preceding the date that subsequent report is furnished.

2. Report to be in writing. Each investigative consumer report shall be in writing, shall identify the sources of all information contained therein and shall be retained in the file of the consumer to whom it relates for a period of 2 years following its completion if it has been compiled or reported for employment purposes, or for a period of at least 6 months for other purposes. The sources of information in the file need not be disclosed to the consumer except pursuant to the process of discovery in a lawsuit.

1977, c. 514; 1977, c. 677, § 9.

§ 1320. Requirements on users of consumer reports

1. Procedures when action taken because of consumer report

information. Whenever credit or insurance for personal, family or household purposes, or employment involving a consumer is denied or the charge for that credit or insurance is increased because of information contained in a consumer report or investigative consumer report, or partly because of information contained in a consumer report or investigative consumer report from a consumer reporting agency, the user taking such action shall:

A. Disclose in writing to the consumer against whom such adverse action has been taken:

(1) A statement that its action was based in whole or in part on such a consumer report;

(2) The name, street address and telephone number of the consumer reporting agency making the report; and

(3) A statement informing the consumer of the right to inspect and receive a copy of that report by contacting the credit reporting agency.

2. Procedures when credit denied or charge for credit increased. Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, or credit capacity, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within 60 days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

3. Dissemination of consumer report information prohibited. Every user of a consumer report or an investigative consumer report shall be prohibited from disseminating to any other person any such report other than information contained in its own files as a result of its direct experience with the consumer.

4. Nonliability. No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subsections 1, 2 and 3.

1977, c. 514; 1977, c. 677, § 10.

§ 1321. Prohibited information, accuracy, relevancy and obsolescence of information in reports

1. Reporting agencies. No consumer reporting agency shall prepare, use or report information:

A. Relative to a consumer's race, religion, color, ancestry, ethnic origin, sexual preference or orientation, political affiliation or political beliefs, except to the extent required by governmentally imposed record-keeping requirements or to the extent necessary to prepare, use or report information relative to an arrest or criminal charge, as provided in paragraph B, or a consumer's marital status; or

B. Relative to an arrest or a criminal charge or admission of wrong doing in connection with a detention pursuant to Title 17, section 3521, unless there has been a criminal conviction for that offense or unless the charge is still pending, and, additionally, when the information reflects sexual preference or orientation, unless the conduct which is the basis of the arrest or criminal charge constitutes an offense under the provisions of the Maine Criminal Code or comparable law of another jurisdiction.

2. Irrelevant or Inaccurate information. A consumer reporting agency shall not prepare, use or report information which it has reason to believe is inaccurate or not relevant to the purpose for which it is sought.

3. Procedures to insure report accuracy. A consumer reporting agency shall adopt and follow reasonable procedures designed to assure maximum possible accuracy of the information concerning the individual to whom the report relates and exclude from its file inaccurate information, information which

cannot be verified, and information which it has no reason to believe is not relevant to the purpose for which it is sought.

4. Items prohibited in reports

A. Except as authorized under paragraph B, no consumer reporting agency may make any consumer report or investigative consumer report containing any of the following items of information:

(1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than 14 years;

(2) Suits and judgments which, from date of entry, antedate the report by more than 7 years or until the governing statute of limitations has expired, whichever is the longer period;

(3) Paid tax liens which, from the date of payment, antedate the report by more than 7 years;

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than 7 years;

(5) Records of arrest or of conviction of crime which, from date of disposition, release or parole, antedate the report by more than 7 years;

(6) Information regarding drug or alcoholic addiction unless such information is provided by a licensed practicing physician and the information relating to such addictions does not antedate the consumer report or investigative consumer report by more than 7 years;

(7) Information relating to past confinement in a mental institution when the date of last confinement antedates the report by more than 7 years; and

(8) Any other adverse item of information which antedates the report by more than 7 years.

B. The provisions of paragraph A are not applicable in the case of any consumer credit report to be used in connection with:

(1) A credit transaction involving, or which may reasonably be expected to involve, a principal amount of $50,000 or more;

(2) The underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $50,000 or more except that the provisions of paragraph A, subparagraphs 6 and 7 are not applicable in connection with the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $25,000 or more;

(2-A) The underwriting of disability income insurance involving, or which reasonably may be expected to involve, an indemnity for total disability of $1,000 per month or more; or

(3) The employment of any individual at an annual salary which equals, or which may reasonably be expected to equal, $20,000 or more.

5. Listing of denial of credit prohibited in certain situations. No consumer reporting agency shall issue a consumer report which lists a person as having been denied credit if the sole reason for such denial is lack of sufficient information to grant credit, unless the report states that the denial was for such reason.

1977, c. 514; 1977, c. 677, §§ 11, 12.

§ 1322. Civil liability for willful noncompliance

Any consumer reporting agency or user of information which willfully and knowingly fails to comply with any requirement imposed under this chapter with respect to any consumer is liable to that consumer in an amount equal to the sum of:

1. Actual damages. Any actual damages sustained by the consumer as a result of the failure;

2. Treble damages. In addition to actual damages, there

shall be assessed against the willful violator a sum of 3 times such actual damages.

3. Costs of attorney's fees. In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

1977, c. 514.

§ 1323. Civil liability for negligent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this chapter with respect to any consumer is liable to that consumer in an amount equal to the sum of:

1. Actual damages. Any actual damages sustained by the consumer as a result of the failure;

2. Additional damages. Such amount of additional damages as the court may allow, but not less than $100 for each violation of this chapter involving negligence, and for each consumer report containing any item of information that was inaccurate or that the consumer reporting agency had reason to believe was not relevant to the purpose for which it was sought and that contributed in whole or in part to the decision to take adverse action against the consumer.

3. Costs and attorney's fees. In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

1977, c. 514; 1977, c. 677, § 13.

§ 1324. Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this chapter may be brought in any court of competent jurisdiction, within 2 years from the date on which the liability arises, except that when a defendant has materially and willfully misrepresented any information required under this Title to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this chapter, the action may be brought at any time

within 2 years after the discovery by the individual of the misrepresentation.

1977, c. 514.

§ 1325. Obtaining information under false pretenses

Notwithstanding the provisions of Title 17-A, section 4-A, any person who knowingly and intentionally obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned for not more than one year, or both.

1977, c. 514

§ 1326. Unauthorized disclosures by officers or employees

Notwithstanding the provisions of Title 17-A, section 4-A, any officer or employee of a consumer reporting agency who knowingly and intentionally provides information concerning an individual from the agency's files to a person not authorized, within the meaning of sections 1313 and 1314 subsection 1, to receive that information shall be fined not more than $5,000 or imprisoned for not more than one year, or both.

1977, c. 514; 1977, c. 677, § 14.

§ 1327. Repealed. 1979, c. 541, § B, 11, eff. June 22, 1979

§ 1328. Administrative enforcement

1. Authority. The administrator, within the limits provided by law, may:

A. Receive and act on complaints, take action designed to obtain voluntary compliance with this Act or refer cases to the Attorney General who shall appear for and represent the administrator in court;

B. Counsel groups and persons on their rights and duties under this Act;

C. Establish programs for the education of consumers with respect to the provisions of this Act;

D. Make studies appropriate to effectuate the purposes and policies of this Act and make the results available to the public;

E. Issue advisory rulings designed to clarify the applicability of any statutory provision; and

F. Maintain a public file of all enforcement proceedings instituted and of their disposition, including all assurances of voluntary compliance accepted and their terms and the pleadings and briefs in all actions in which the administrator is a party.

2. Investigatory powers.

A. The administrator may annually investigate any person whom he believes has engaged in conduct governed by this Act; provided that the administrator may, at any time, investigate any person he believes to be a consumer reporting agency. If the administrator has reasonable cause to believe that any person has violated this Act, he may investigate that person at any time. During any investigation, the administrator may administer oaths or affirmations and, upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence. If the administrator finds a violation of this Act, he shall so notify all parties to the transactions involved.

B. If the person's records are located outside this State, the person, at the administrator's option, may either make the original records or facsimilies thereof available to the administrator at a convenient location within this State or pay the reasonable and necessary expenses for the administrator or his representative to examine them at the place where they are maintained. The administrator may designate representatives, including comparable officials

of the State in which the records are located or federal officials, to inspect them on his behalf.

C. The expenses of the administrator necessarily incurred in the examination of persons subject to this chapter shall be chargeable to that person in the same manner and for the same expenses set forth in Title 9-A, section 6-203, subsection 4, except that users as defined in section 1312, subsection 11, shall not be charged examination expenses unless the administrator finds a violation of this Act.

3. Administrative enforcement orders. After notice and hearing, the administrator may order any person to cease and desist from engaging in violations of this Act. The administrator may also order affirmative action designed to correct past or future violations of this Act. Any hearing held under this subsection shall be conducted in accordance with the procedures of the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV.[1] A respondent aggrieved by an order of the administrator may obtain judicial review of the order and the administrator may, through the Attorney General, obtain an order of the court for enforcement of its order in the Superior Court. The proceedings for review or enforcement shall be initiated and conducted in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter VII.[2]

4. Assurance of discontinuance. If it is claimed that a person has engaged in conduct which could be subject to any order by the administrator, the administrator shall first attempt to negotiate an assurance in writing that the person will not engage in the same or similar conduct in the future, prior to initiating an enforcement order under subsection 3. The assurance may include, but is not limited to, admissions of past specific acts by the person or that such acts violated this Act or other statutes. A violation of an assurance of discontinuance shall be a violation of this Act.

5. Civil action. The administrator, through the Attorney General, may bring a civil action against a person to recover a

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[1]Section 9051 et seq. of title 5.

[2]Section 11001 et seq. of title 5.

civil penalty for knowingly violating this Act or violating an assurance of discontinuance, and if the court finds that the defendant has engaged in a knowing violation of this Act or a violation of an assurance of discontinuance, it may assess a civil penalty of not more than $5,000.

If the defendant establishes by a preponderance of evidence that repeated violations where the result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under this subsection.

6. Remedies not affected. The grant of powers to the administrator in this section does not affect remedies available to the Attorney General or to consumers under this Act or under other principles of law or equity.

7. Venue. The administrator, through the Attorney General, may bring actions or proceedings in a court in a county or division in which an act on which the action or proceeding is based occurred or in a county or division in which a respondent resides or transacts business.

8. Bureau of Insurance. With respect to those examinations authorized by subsection 2, paragraph A, first sentence, the administrator shall, where applicable, coordinate examinations for compliance with this Act with examinations conducted by the Bureau of Insurance for compliance with Title 24-A.[3]

1979, c. 636, § 2.

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[3]Section 1 et seq. of title 24A.

APPENDIX D

EQUIFAX SERVICES

PERSONAL—CHARACTER REPORT

Acct. No. | File No. or Requestor

CAUTION TO CUSTOMER: *Under terms of our Agreement, this report is submitted with the understanding that it is to be held in STRICT CONFIDENCE. Except where required by law, no information in this report may be revealed directly or indirectly to any person except to one whose official duties require him to pass on the transaction.*

.....**OFFICE**

REPORT FROM .....

(If not city in heading) *(State whether former addr., etc.)*

Date of Birth or Age:

IDENTITY:	1—A. How many years has each of your sources known him? B. How long since sources have seen subject? C. Any reason to question accuracy of age or date of birth above? D. Marital Status? No. of Dependents (including wife)?	A. B. C. D.
BUSINESS:	2—A. What is his present occupation? B. Name of employer? C. Work full or part time? (If part time, cover below)	A. B. C.
FINANCES:	3—A. Any financial difficulties? B. What would you estimate net worth and income?	A. B. Worth $ Income $

			NO	YES	AMPLIFY "YES" ANSWERS BELOW
HEALTH:	4—A. Any history of ill health? B. Any impairment—mental, physical, health?	A. B.			
HABITS:	5—A. Any past or present drinking to boisterousness or intoxication?	A.			
PERSONAL:					
	6—A. Do you learn of any domestic or personal difficulties?	A.			
	B. Any reason to question his reputation as to character, dependability or morals?	B.			
	C. Any reason to question his employment record?	C.			

A. EDUCATION:
Cover extent of education as developed through outside sources.

B. PERSONAL-NEIGHBORHOOD:
Comment on home surroundings and activities and interests. If minor or woman give name, occupation, worth, income and reputation of father or husband. If married woman, give ages of children.

C. AMPLIFY ANY "YES" ANSWERS FROM ABOVE.

D-2

Equifax Services Inc.
Equifax Services Ltd.
Form 1613—9-77 U.S.A.

SUPREME COURT, U.S.
FILED
JAN 5 1981
MICHAEL RODAK, JR., CLERK

NO. 80-914

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RICHARD S. COHEN, ATTORNEY GENERAL,
STATE OF MAINE,

Petitioner,

v.

EQUIFAX SERVICES, INC.,
FRANK W. ROBINSON AND PAUL D. WEEKS,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

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NO. 80-914

IN THE

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OCTOBER TERM, 1980

RICHARD S. COHEN, ATTORNEY GENERAL,
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v.

EQUIFAX SERVICES, INC.,
FRANK W. ROBINSON AND PAUL D. WEEKS,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

STATEMENT OF THE FACTS

Although Petitioner has generally described the facts which are material to the consideration of the questions presented, a number of aspects of his statement are objected to by Respondents as not being established in the record below.

In Petitioner's Statement of the Case, the "purpose" of the Maine Fair Credit Reporting Act, 10 M.R.S.A. §1311 et seq. (hereinafter the "Maine Act") is alleged to have been set forth in a "statement of legislative intent which accompanies the

original bill." Petition, p. 5.[1] By citation to this "statement" Petitioner infers both that it was part of the record below, and that it represents a statement by the Maine legislature of its purpose and intent in passing the Maine Act. The "Statement of Fact" cited is nothing more than a description by the author of the bill of his motivations in introducing it, which is required in Maine to be appended to all legislative documents submitted for consideration. It is not a statement by the Legislature itself. It is significant to note that the Maine Legislature chose not to include any of the author's stated purposes in a preamble to the law as passed, in the manner that Congress included a preamble in the Federal Fair Credit Reporting Act. 15 U.S.C. §1681.

Respondents object to the Statement's use in the Petition since it was never made a part of the record below. It was never introduced into evidence and should not be judicially noticed. Under the Maine Rules of Evidence, Rule 201, courts are only permitted to take judicial notice of so-called adjudicative facts. That Rule states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Maine Rules of Evidence 201.

Under this Rule, the Maine courts are not permitted to take notice of so-called "legislative facts" which tend to "hinge on social, economic, or political facts." R. Field and P. Murray, *Maine Evidence*, "Adviser's Notes" to Rule 201, p. 27. Certainly the "Statement of Fact" does not fall under the rubric for judicial notice of adjudicative facts. Rule 1005 of the Maine Rules of Evidence provides that public records (such as legislative documents) be introduced into evidence by copy. This is consistent

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[1]Citations to the Petition shall be as shown. Citations to the Opinion of the Maine Supreme Court and Superior Court shall be to the Appendix filed with the Petition as follows: App., p. .

with long standing common law in Maine which has denied judicial notice of private and special acts of the legislative (*Proprietors of Fryeburg Canal v. Frye*, 5 Me. 38, 43 (1827)), and of municipal ordinances (*Summit Realty, Inc. v. Gipe*, 315 A.2d 428, 429-30 (Me. 1974)), and other such matters. The record below is clear that Petitioner never introduced this statement of fact into evidence. It cannot now be cited by Petitioner as "evidence" of legislative intent. The Maine Supreme Judicial Court has indicated that "the Legislature can be motivated by plural objectives in promulgating a law." *State of Maine v. Seaburg*, 154 Me. 210, 212 (1958). It is therefore dangerous to look only to the stated purpose of the bill's author. While legislative history is certainly useful in developing legislative intent, that history must be introduced properly before it may be considered.

The Maine Supreme Judicial Court in this case did, upon examination of the statute, make a finding of the legislative intent in passing at least one of the provisions in question here. They held that:

> the regulatory approach in §1321 manifests a governmental conception that in order to prevent intrusions upon 'privacy' by unlawful discrimination and improperly influenced decision-making, it is necessary to exclude entirely various items of information from the consideration of users and, therefore, to require the purging of such data from consumer agency reports. App., at A-29.

This is, at most, the only legislative purpose which can be now cited for this Court's consideration. The legislative purpose proffered by Petitioner is not properly before this Court.

Another aspect of the Petition's Statement of the Case should be clarified. Petitioner attempts to distinguish a "consumer report" from an "investigative consumer report" by indicating that the investigative type is "a consumer report which includes information bearing on a consumer's character, general reputation, personal characteristics or mode of living which is obtained from neighbors, friends, or associates of the consumer." Petition, p.6. However, under the particular definition of the Maine Act,

information on the consumer's "character, general reputation, personal characteristics or mode of living" does not necessarily need to be obtained from "neighbors, friends, or associates of the consumer" in order to bring the report into the investigative category. The Maine Act, at 10 M.R.S.A. §1312(7), indicates that a report containing information on a consumer's personal characteristics will still be an "investigative report" even if the report is not obtained from neighbors but if the information is obtained "by other means." Thus, investigative consumer reports, the type regulated by the sections of the Maine Act in question, could consist merely of information on an individual's driving record obtained from public records, or from newspaper clippings. For instance, a report which indicates that a person has been convicted twice of reckless driving and which cites two newspaper articles and the State Motor Vehicle Records to that effect, would be a "investigative consumer report" under the definitions of the Maine Act and therefore could not be disseminated to an automobile insurance company unless the applicant for insurance had first given his written consent to disclosure of that information. Respondent believes that the Court should clearly understand that the regulations involved here are not limited only to so-called "subjective" information obtained from neighbors, but in fact cover every report which involves the "consumer's character, general reputation, personal characteristics or mode of living" even through those reports are truthful, accurate, and obtained from the public records.

REASONS FOR DENYING THE WRIT

I. The Maine Supreme Judicial Court Correctly Applied This Court's Opinions Regarding First Amendment Protection For "Commercial Speech"

Petitioner has urged this Court to grant certiorari on the ground that the Maine Supreme Judicial Court incorrectly applied to consumer reports this Court's "commercial speech" doctrine as most recently summarized in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, ___U.S. ___, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Respondents believe that the opinion of the Maine Supreme Judicial Court

correctly utilized that "commercial speech" doctrine. Petitioner attempts to distinguish consumer reports from "advertising" since this Court's decisions involving commercial speech have primarily involved advertising issues. Petitioner argues that because of an alleged functional difference, the First Amendment protection accorded advertising should not be accorded to consumer reports. Petition, p. 8. Respondents disagree.

Petitioner ignores the breadth of this Court's rulings regarding commercial speech by attempting to limit protection to advertising alone. As Respondents read the Court's decisions in this area, "commercial speech" has been broadly defined as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas, supra,* ____U.S. at ____; 100 S.Ct. at _____, 65 L.Ed.2d at 348. While advertising falls within this area, so do many other forms of speech, such as proxy statements or corporate annual reports. *First National Bank of Boston v. Francis X. Bellotti,* 435 U.S. 765, 802 (1978) (White, J., dissenting). Certainly consumer reports are also included. They are written reports which are prepared by the consumer reporting agency for a fee at the request of an authorized customer intended for the use of the ordering insurance company, employer or business in making their business decisions.

For many years this court utilized "commercial speech" as a catchword to identify that business oriented speech whose content lacked the social, political or religious content of a novel, newspaper or tract, and so deprived it of the protection of the First Amendment. *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). In the years between *Valentine* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), which overturned *Valentine,* many forms of communication were singled out as "commercial speech," including consumer reports. e.g., *Millstone v. O'Hanlon Reports, Inc.,* 528 F. 2d 829 (8th Cir. 1976). However, this court recognized in *Virginia Pharmacy, supra,* that forms of expression which are important to the functioning of our economy are worthy of a limited measure of First Amendment protection. Because of the role that free enterprise plays in our society, any speech which aids in making informed business judgments should be protected.

Advertising is certainly not the sole form of communication which meets this test.

The fundamental justification for First Amendment protection to commercial speech rests on the theory that:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. *Virginia Pharmacy, supra,* at 765.

In reaching this conclusion this Court relied upon and cited Justice Douglas' dissent from denial of certiorari in *Dunn & Bradstreet, Inc. v. C. R. Grove,* 404 U.S. 898 (1971). That case involved consumer reports. In part, Justice Douglas stated,

> When immersed in a free flow of commercial information, private sector decision making is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dunn & Bradstreet, Inc. are part of the fabric of national commercial communication. . . . Presumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion . . . arising out of a squabble over whether a vendor had sold obscene magazines. *Id.* at 905-906 (Douglas, J. dissenting).

Citation to this opinion as authority for overturning long standing court doctrine would be strange if the subject of the opinion, consumer reports, were to still be deprived First Amendment protection. This Court has recognized in its commercial speech decisions a protection for various kinds of commercial speech whether that speech be aimed at the individual purchasing decisions of private individuals or whether it constitutes information supplied to businesses who make insurance, employment, and

credit decisions about those consumers. Both forms of commercial speech are indispensable to a free market economy. It is clear that the court's "commercial speech" doctrine does encompass consumer reports.

However, Petitioner attempts to distinguish consumer reports from protected forms of commercial speech by focusing on the audience of such reports. Petition, p. 9. Petitioner seeks to build a difference on the fact that advertising, unlike consumer reports, is supposedly aimed at "consumers" who are making decisions about which toothpaste to use, or deciding whether one can successfully combine a detergent and fabric softener in one liquid. Consumer reports, on the other hand, are different Petitioner argues, in that the "consumer" is the subject of the speech made to a "third party." Petition, p. 9. Respondents believe that this view blindly concentrates on the "consumer" as an individual person, and overlooks the fact that insurance companies or employers are in fact consumers of the reports Respondent Equifax produces. Corporate and business entities have the right to receive truthful and accurate information about individuals who have applied to them for a benefit, as much as consumers have the right to know about brands of bread and butter. This court's commercial speech doctrine is not limited to "hawking of wares" to individual persons (*Bellotti, supra,* at 783 n. 20) but rather encompasses any speech which "serves individual and societal interests in assuring informed and reliable decision making." *Bates and O'Steen v. State Bar of Arizona,* 433 U.S. 350, 364 (1977).

It is important to note that the actual question of whether an individual purchases Tide or Fab, is of little importance to anyone but that person and perhaps to those wearing the clothes he or she washes. But in the aggregate, millions of individual purchasing decisions such as that may affect the employment of thousands or the price for detergents nationally. Similarly, a single consumer report regarding the health of an applicant for life insurance, his smoking habit, or driving record, may not impact anyone but the applicant. But taken in the aggregate, millions of such reports affect the cost of insurance to everyone. When provided with accurate information on applicants, insurance

companies can correctly categorize risks and assign higher premiums to those who engender, through their health or avocations, higher risks, and lower premiums to those who pose lower risks. Without this information the premiums for high risks would be borne by everyone and the cost of insurance to the vast majority of applicants would increase. cf. App., at p. A-18 n.9. Credit and employment reports in the aggregate have a similar impact on the cost of goods and services. It is this impact upon the economy which mandates that decisions by businesses be intelligent and well informed. Consumer reports are prepared to that end. The importance of consumer reports to the national economy has been recognized by Congress in its findings regarding the Federal Fair Credit Reporting Act. 15 U.S.C. §1681(a)(3). See *Tureen v. Equifax, Inc.*, 571 F.2d 411, 416 (8th Cir. 1978). The Maine Supreme Judicial Court recognized the importance of consumer reports as "an important source of information through which users seek to obtain information to assist them in making decisions incident to the conduct of their businesses." App., at A-5. The distinction Petitioner attempts to develop between these reports and advertising does not withstand analysis. Even admitting that the audience or subject matter of consumer reports are different from advertising, this fact does not *a fortiori* annul the reports' vital function in our economy and concommitant First Amendment protection.

A number of other statements made by Petitioner in support of granting the writ need to be clarified. Petitioner states that,

> Presumably, the consumer understands that when he applies for insurance, credit, or employment, information concerning his economic reliability may be collected and evaluated. However, the consumer may not understand that, absent regulatory legislation, an investigative consumer report may contain such matter as the opinion of a neighbor concerning the consumer's political beliefs and sex life. Petition, p. 9-10.

This is simply not true. First, nothing in the record suggests that consumer reports often, if ever, contain information on a person's "sex life" as Petitioner intimates. Petitioner insists here, as

he did below, on hypothecating that reports contain "sex life" data. Yet after extensive discovery in the files of Respondent Equifax no witnesses or reports demonstrating such data were ever introduced. App., p. A-9. Petitioner is using the exception as though it were the rule in an inflamatory way. Most reports are prepared through public record information and personal interviews with the subject himself. App., at A-4. In addition, the consumer is notified, as required by Federal law, that a report is to be made on him. Federal Fair Credit Reporting Act, 15 U.S.C. §1681(d). This practice clearly informs him that the report may include "information as to his character, general reputation, personal characteristics, and mode of living." 15 U.S.C. §1681(d)(a)(1). The consumer is thus well aware that the report may involve his personal life.

Petitioner also states,

> In light of the fact that such personal information generally does not bear a reasonable relationship to a consumer's insurability or credit worthiness, the Maine Act supports the reasonable expectation that certain kinds of information will be kept private.

This statement is also simply contrary to the specific facts found by the Maine Supreme Judicial Court. That Court concluded that any information which does regard an applicant's personal life, (including Petitioner's examples - political beliefs or sex life,) may well bear a reasonable relationship to a consumer's insurability or credit worthiness. App. at A-30 n. 18. Based upon a distorted statement of the facts, Petitioner attempts to develop some "expectation of privacy." Yet no reasonable expectation of privacy does arise in the consumer since he is clearly informed that a consumer report can contain information regarding his private life. Additionally, since the particular sections of the Maine Law in question limit the reporting of public record information, it is clear that the law does not in fact protect any expectation of privacy. A person can have no such expectation if the information is known to all or available from public records. Petitioner also admits that the identical information barred from being reported by consumer reporting agencies can

be investigated and reported by insurance companies and employers without restriction. Petition, p. 13. It is clear that if an "expectation of privacy" in insurance or employment applications existed, this law does not protect it.

Petitioner also states that,

> Unlike individuals whose activities are reported in the mass media, the subject of consumer reports do not have direct access to the information disseminated concerning them. Petition, p. 10.

This statement is simply contrary to the law itself. The Federal Fair Credit Reporting Act allows consumers to learn of the content of their report (15 U.S.C. §1681(g)) and the Maine Act additionally allows consumers to receive actual copies of their report. 10 M.R.S.A. §1316(2). Therefore, individuals certainly have as much access to consumer reports as they would to information reported in "the mass media." Petitioner also states that "the subject of an investigative consumer report cannot control the extent of the intrusion into his private life." Again, this is simply not true. First of all, no "intrusion" exists. App., at A-20. But even if it did, the consumer can choose to withdraw his application for credit or insurance rather than have a consumer investigative report done on him. If applicants wish to have life insurance, they must allow the life insurance company to collect information about them to enable the company to evaluate the risk involved in issuing the policy. To deny truthful and accurate information to an insurance company about an individual applicant simply destroys the entire underwriting process which is based upon differing scales of risk depending upon the background and facts of the individuals involved.

In general, Petitioner's first argument for granting the writ is that consumer reporting is somehow more "intrusive" on private persons than advertising and therefore such reports are more amenable to prophylactic regulation than other forms of commercial speech. Petitioner overlooks the specific findings of the Maine Supreme Judicial Court (App., at A-29-30) and the Superior Court of the State of Maine. App., at B-9. The provisions

of §1314 and §1321 are simply not tailored to prevent this alleged "intrusion." Even admitting that an "intrusion" occurs, the law bans all reports not just those which contain subjective data acquired from neighbors. The definition of "consumer investigative report" not only covers reports based on information obtained "through personal interviews with neighbors, friends or associates" but additionally covers reports containing any information on the consumer's "character, general reputation, personal characteristics or mode of living," obtained "by other means" as well. 10 M.R.S.A. §1312(7). Thus, investigative reports containing public record information, information voluntarily supplied by the consumer, or gleaned from newspaper clippings, are prohibited or strictly limited under the challenged provisions. This Court has established that privacy interests fade when information is made a part of the public record. *Cox Broadcasting v. Cohen,* 420 U.S. 269, 296 (1975). The Petitioner has failed to produce any evidence in the court below, or in the appendix for this Court's benefit, which shows that consumer reporting is so "intrusive" on a consumer's "privacy" to justify a complete prophylactic ban of all reprots including those containing information derived solely from public record information or obtained voluntarily from the consumer himself. For this reason, the first argument of Petitioner does not warrant issuance of the writ.

II. The Maine Supreme Judicial Court Correctly Assessed the State's Interest in Protecting Personal Privacy to be Insufficient to Justify §§1314 and 1321 of the Maine Act

In assessing the constitutionality of the Maine Fair Credit Reporting Act and in particular, 10 M.R.S.A. §1314 and §1321, the Maine Supreme Judicial Court utilized the four-part test established in *Central Hudson Gas and Electric Corp., supra.* Petitioner now asserts that the court improperly applied the test in determining whether a "substantial governmental interest" was asserted by the State to justify this law. In the courts below, Petitioner asserted that "privacy" of consumers justified the complete suppression of consumer reports unless the consumer consented to the reports. Even when the consumer had consented, this "privacy interest," Petitioner argued, also justified

total suppression of certain categories of "prohibited" information. Privacy was so substantial an interest, that even truthful, relevant and not misleading information obtained from public records had to be circumscribed.

Petitioner sought in the Superior and Supreme Courts of Maine to demonstrate the existence of this substantial interest by citing "the constitutional and tort law protections afforded privacy." App., at A-19. Having been rebuffed in this attempt to justify the law, Petitioner now criticizes the Supreme Judicial Court for examining the very tort law and constitutional concepts he previously cited. Petition, at p. 11. Petitioner now claims that some other elusive privacy interest which is substantial and which justifies the law lurks within the provisions of the Maine Fair Credit Reporting Act. The error Petitioner asks this Court to overturn was the failure of the Maine Supreme Judicial Court to find this interest and to label it as "substantial."

Yet, if there was some substantial intrusion on the privacy of consumers, which is inherent in the nature of all consumer reports, Petitioner failed utterly to present evidence of this in the court below. The findings of the Supreme Judicial Court and of the Superior Court belie Petitioner's argument that a substantial privacy interest existed to justify the suppression of consumer reports. App., at A-17, A-17 n. 9, A-18, B-7-B-11. Despite extensive discovery by Petitioner in the files of Respondent Equifax, not one report was introduced, and not one witness was offered to demonstrate the intrusion now offered as a "substantial" state interest. App., at A-9. It is little wonder that the Maine Supreme Judicial Court could look only to tort or constitutional law to find a privacy interest. Only in those areas could one arguably find an interest of substance rather than imagination.

The Petitioner has continued to believe that in analyzing commercial speech cases, the state need only hypothecate a substantial interest in order to justify its regulations. This is why Petitioner only states that consumer reports intrude on privacy, rather than demonstrating that they do. Yet the decisions of this Court have consistently held that " . . . it is clear that commercial speech cannot be banned because of an unsubstantiated

belief that its impact is detrimental." *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 92 n. 6 (1977). Accord *Friedman v. Rogers,* 440 U.S. 1, 13 (1979). The Maine Supreme Judicial Court rightly refused to accept Petitioner's presumptions about the privacy impact of consumer reports. App., at A-17-A-18. Petitioner's present position is no stronger. The only substantial privacy interest which can be asserted given the facts in the record are the areas of constitutional and tort law, and Petitioner does not challenge the Maine Supreme Judicial Court's finding that they do not justify the proscriptions of §1314 and §1321.

Petitioner's argument also creates a "red herring" of sorts. Even if Petitioner were right about this "privacy interest," it would still not be sufficient to justify the provisions in question. In *Central Hudson Gas, supra,* this Court indicated that to be protected "commercial speech" must be determined at least to "concern lawful activity and not be misleading." *Id.* _____U.S. at _____ ; 65 L.Ed.2d at 351. The Maine Supreme Judicial Court did find that on the basis of the overwhelming evidence in the record before it, consumer reports were neither unlawful in and of themselves nor misleading. On the contrary, consumer reports were found to be, in a vast majority of cases, truthful and accurate. App., at A-17. In this situation, *Central Hudson Gas* required a showing of a "substantial governmental interest" in order to supress the speech. *Id.* Petitioner now asserts that the "substantial governmental interest" he proffered to justify the law was improperly rejected by the Maine Supreme Judicial Court. However, even assuming that the court had accepted the justification advanced, the doctrine of *Central Hudson Gas* still required that the court determine whether, "the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* As the decision of the Maine Supreme Judicial Court demonstrates, the provisions of §§1314 and 1321 were found not to directly advance the governmental interest of "privacy" which had been asserted, and to be broader than necessary to serve that interest. App., at A-17. Thus, even if Petitioner is correct, which Respondent denies, that a substantial governmental interest was asserted, Petitioner has not

demonstrated that the court was in error in overturning these sections for failure of the provisions to satisfy the third and fourth tests set forth in *Central Hudson Gas.* Petitioner's new "privacy interest" still is not served by restricting public record information since it is not private information. And this total supression of reports is far broader than necessary to achieve protection of even this new "privacy" interest. For this reason, there is no reason for granting the petition.

It is important to note that the interpretation and construction of Maine statutes and law rests in the Maine Supreme Judicial Court and not in this Court. *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). The Maine Supreme Judicial Court has interpreted the statutes and common law of Maine, including the Maine Fair Credit Reporting Act at issue here, as not establishing any "substantial interest" of the type now asserted by Petitioner. And the views and findings of the Maine Supreme Judicial Court regarding the nature of the interest sought to be served by the statute also deserves careful consideration. *Rundlett v. Oliver,* 607 F.2d 495, 500-502 (1st Cir. 1979).

The record clearly did not show, as Petitioner now claims, that the interviews sometimes used in preparing reports "intrude directly upon the persons being interviewed" or that "questions asked during an investigation may elicit information not reasonably relevant to the economic purpose underlying the report." Petition, p. 12. On the contrary, the specific facts of this case as found by the Maine Supreme Judicial Court demonstrate that reports most often elicit information which is publicly known and which is reasonably relevant to the economic purpose of the report. App., p. A30 - A31. Thus, the assertion in the petition that, "inappropriate information" is disseminated so that an invasion of the "privacy of the consumer" occurs which "may result in reputational injury" (Petition, p. 12) is simply contrary to the facts of this case. The Court should also be aware that "dissemination" of reports is strictly limited under the Federal and Maine Fair Credit Reporting Acts. 15 U.S.C. §1681 (b); 10 M.R.S.A. §1313.

Petitioner also claims that the prohibitions over reporting

certain categories of information found in §1321 of the Maine Act are the

> only effective way of enforcing this legislative judgement . . . that certain categories of information, such as race, religion, and ethnic origin, are not appropriately contained in reports intended to aid in the assessment of a consumer's eligibility for insurance, employment, or credit. Petition, p. 13.

However, Petitioner again, as he did in the courts below, fails to realize that no clear legislative judgment regarding the use of such information has been made. On the contrary, as Petitioner admits "insurance companies, banks, etc. . . . remain free to collect and use any information they deem appropriate." Petition, p. 13. No law in the State of Maine makes use of such information in insurance decisions illegal. cf. Maine Human Rights Act, 5 M.R.S.A. §4552. Therefore, §1321 simply could not have been designed to achieve the so-called "legislative judgment" which Petitioner asserts was made. Additionally, the Maine Supreme Judicial Court did not find such a legislative judgment had been made. App., at A-31-33, and its findings should be accorded great weight. *Rundlett v. Oliver, supra.* Petitioner's additional assertion that this so-called "interest" of the State in limiting the information upon which business judgments are made to only "relevant" information or "appropriate information," can only be furthered by a blanket restriction on consumer reporting is simply contrary to common sense. The Maine Supreme Judicial Court pointed this out in its decision. App., A-32.

One last point might be made. The Petition mentions the Federal Fair Credit Reporting Act, 15 U.S.C. §1681, et. seq., and the Maine Act. This Court should understand that the consumer reporting industry is already heavily regulated as a review of these acts will show. The purpose, use, and methods of reporting are all clearly restricted by these laws. The further need of such extensive content based restrictions on reports as found in the challenged sections is difficult to justify given the existing regulation which covers the reporting industry.

Petitioner's second reason for granting the writ appears to be based solely upon evidence not part of the record, and directly contrary to the Maine Supreme Judicial Court's findings.

III. No Important Question of Federal Law Exists in this Case.

Petitioner attempts to develop an "important question of Federal law" out of the issues involved in this case. However, Respondents believe that the decision in this case is consistent with *Central Hudson Gas, supra,* and the other rulings of this Court and that clarification with regard to consumer reports is not necessary.

Petitioner also attempts to argue that provisions in the laws of "at least 13 states" (Petition, p. 15) which are similar to the Maine law are now suspect. However, Petitioner has set up a straw man in these statutes since their constitutionality depends largely upon the analysis of *Central Hudson Gas, supra,* when applied to the specific facts of those statutes. It may well be that the State of New York, for instance, could demonstrate a substantial governmental interest on a record which would justify the provisions in its law. Respondent, of course, believes that such a record could not be developed because no evils of such substantial magnitude exist to justify such drastic restrictions on reporting truthful, public record information. Since the test used to determine the constitutionality of those statutes is factually based, nothing in the Maine Supreme Judicial Court's decision mandates that those other state laws would be struck down. Those questions will be left to another day, on records involving those laws.

Petitioner also attempts to develop a controversy between the decision by the Maine Supreme Judicial Court and that of the Eighth Circuit Court of Appeals in *Millstone v. O'Hanlon Reports, Inc., supra. Millstone* was decided before *Virginia Pharmacy, supra,* and the other commercial speech decisions of this Court and held that consumer reporting was not protected speech under the First Amendment. The basis of the *Millstone* decision was that consumer reports were "commercial speech" not

entitled to protection. *Id.* at 833. Most significantly, however, the law at issue in that case was the Federal Fair Credit Reporting Act. That Act does not contain anything analogous to the two provisions at issue here, 10 M.R.S.A. §1314 and §1321. Since *Millstone* did not deal with such restrictions on truthful, accurate speech, no substantial conflict between the cases exists.

Petitioner also attempts to magnify the importance of this case by arguing that its reasoning "appears to impair other well established types of economic regulation, including securities laws, labor laws, anti-trust laws, and debt collection laws, all of which limit commercial expression to some extent." Petition, at p. 17. It is not exactly clear why the reasoning of this case would so imperil such regulation since the reasoning of the Maine Supreme Judicial Court follows precisely the reasoning of the U.S. Supreme Court in *Central Hudson Gas.* Why application of an existing doctrine to consumer reports would somehow imperil "labor laws, anti-trust laws, and debt collection laws," is simply a spectre woven from whole cloth in an attempt to justify issuance of the writ of certiorari. It is useless to argue about the validity of those laws since, in those cases, the state's interest may be more substantial or the provision may be tailored to meet the evil asserted. It is mere speculation to equate provisions struck down by the Maine courts with all other forms of regulation which posses some limitation on speech. No important question of Federal law exists which would justify issuance of a writ of certiorari.

CONCLUSION

Respondents believe that Petitioner has failed to demonstrate any of the reasons set forth in Rule 17 of the Rules of this Court which might justify issuance of a writ of certiorari. No additional reasons have been offered to compel this Court's review. Therefore, Respondents respectfully request that the Petition be denied.

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